Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1606

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; BOARD OF EDUCATION OF HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; ROGER WEIHING, ROBERT HAUK, JEAN MEADS, FLOYD MEYER, MERLIN PLAMANN, VICTOR SCHROTH and RONALD SURPRISE, individually and as officers and members of the Board of Education of Hortonville Joint School District No. 1; and MARVIN OBRY, ROBERT KOHLS and GENE RIEDL, individually and as administrators of Hortonville Joint School District No. 1,

Petitioners,

v.

HORTONVILLE EDUCATION ASSOCIATION and MICHAEL WISNOSKI, ROSE MARIE OLSON, THOMAS NADEAU, JUDY MURPHY, RUSSEL LICHTE and RONALD HAMMOND,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

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HORTONVILLE JOINT SCHOOL DISTRICT NO 1; BOARD OF EDUCATION OF HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; ROGER WEING, ROBERT HAUK, JEAN MEADS, FLOYD MEYER, MERLIN PLAMANN, VICTOR SCHROTH and RONALD SURPRISE, individually and as officers and members of the Board of Education of Hortonville Joint School District No. 1; and MARVIN OBRY, ROBERT KOHLS and GENE RIEDL, individually and as administrators of Hortonville Joint School District No. 1,

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HORTONVILLE EDUCATION ASSOCIATION and MICHAEL WISNOSKI, ROSE MARIE OLSON, THOMAS NADEAU, JUDY MURPHY, RUSSEL LICHTE and RONALD HAMMOND,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Wisconsin in this case.

OPINIONS BELOW

The opinion of the Wisconsin Supreme Court (App. I, *infra*, pp. A. 1-41) is reported officially at 66 Wis.2d 469 and unofficially at 225 N.W.2d 658 and 88 L.R.R.M. 3075. The decision of the Wisconsin Circuit Court on Petitioners' motion for summary judgment (App. II, *infra*, pp. A. 42-72) is not officially reported, but is unofficially reported at 88 L.R.R.M. 2743. The decision of the Circuit Court denying Respondents' motion for a temporary restraining order (App. III, *infra*, pp. A. 73-81) is not reported.

JURISDICTION

The judgment of the Supreme Court of Wisconsin was entered February 5, 1975. An order denying rehearings was issued March 28, 1975. (App. I, *infra*, p. A-41). The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3)

QUESTION PRESENTED

Whether the elected members of a public school board, who have the exclusive authority under State law to discharge teachers engaged in an illegal strike, are prohibited by the due process clause of the Federal Constitution from doing so because they are not sufficiently impartial decisionmakers.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 1 of Article XIV of the Amendments to the Constitution of the United States provides as follows: ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of

life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

1 Wis. Stat. Sec. 118.22 (2) (1973) provides: "No teacher may be employed or dismissed except by a majority vote of the full membership of the board."

1 Wis. Stat. Sec. 111.70 (4) (l) (1973) provides: "*Strikes prohibited.* Nothing contained in this subchapter shall constitute a grant of the right to strike by any county of municipal employee and such strikes are hereby expressly prohibited."

STATEMENT OF THE CASE

Petitioners are a Wisconsin school district, the school board, its elected, part-time members, and its agents. The Hortonville School District serves a rural community of 8,500 persons. The teaching employees of the district were represented in collective bargaining by Respondent Hortonville Education Association, which is an affiliate of the largest statewide teachers' labor union, and of the National Education Association.

On March 18, 1974, the teaching employees of the School District went on strike. On March 20, the school superintendent wrote each teacher a letter inviting him to return to work. Several returned. On March 23, the superintendent sent each teacher another letter inviting him back to work, advising him the strike was illegal, and that the board would not condone unlawful activity. None returned to work in response to this letter. (App. I, *infra*, pp. A. 2-3, A.Ap. 166-67)[1]

[1] "A.Ap" refers to the portion of the record printed as the Appellants' Appendix to the briefs in the Supreme Court of Wisconsin.

The respondent teachers were then given separate written notice that the superintendent had informed the school board that the teacher was on strike, and notifying the teacher of a disciplinary hearing scheduled before the school board (App. I, *infra*, p. A. 3; A.Ap. 168, 179). Hearings were held at which respondents appeared and presented their defense through counsel. On April 2, 1974, the school board terminated the employment of the teachers, and so notified the teachers. (App. I, *infra*, pp. A. 4-5; A.Ap. 172-73). Thereafter, the school board hired replacement teachers. One of the terminated teachers reapplied for employment, and he was rehired. (App. I, *infra*, p. A. 5; A.Ap. 175-76)

On April 4, 1974, respondents commenced this action, alleging that the discharges were unlawful under State law and the due process clause of the Federal Constitution, and praying that the school board be enjoined from hiring replacements.[2] On April 11, 1974, a Wisconsin Circuit Court denied respondents' request for a preliminary injunction against hiring replacements; the opinion noted that the teachers were still on strike. (App. III, *infra*, pp. A. 73-81, A.Ap. 145) On July 19, 1974, the Wisconsin Circuit Court granted petitioners' motion for summary judgment, holding that the discharges were valid under State law and did not deny respondents due process. (App. II, *infra*, pp. A. 71-72, A.Ap. 131) Respondents appealed.

On appeal, the Wisconsin Supreme Court explicitly held

[2]The amended complaint (A.Ap. 151-52) alleges that the discharges "denied to the plaintiffs and others similarly situated the liberty and property interests secured to them under the United States Constitution . . ." (para. 9 of amended complaint) and ". . . denied to the plaintiffs, and other teachers similarly situated, procedural due process of law as guaranteed under the Fourteenth Amendment of the United States Constitution . . . ." (para. 10 of amended complaint).

in favor of petitioners on all State law issues. Most significantly, that court said (App. I, *infra*, p. A. 10):

> "from the statutes, the cases cited, and the contract, we conclude the school board did have the power to discharge the teachers who engaged in the prohibited strike."

Turning to respondents' Federal constitutional claims, the Wisconsin Supreme Court defined the procedural due process issue narrowly: ". . . the appellants allege their constitutional inadequacy in only one respect, *i.e.*, the lack of an impartial decisionmaker."[3] (App. I, *infra*, pp. A. 21-22)

The Wisconsin court decided that issue of Federal constitutional law in favor of respondents and reversed the Circuit Court, with two justices dissenting.

In finding a due process violation, the Wisconsin Supreme Court first held that the teachers were deprived of a constitutional property right, rejecting petitioners' argument that illegal striking constituted abandonment of any contract-based property right for due process purposes. The court said that whether a strike occurred was a fact to be determined at a hearing. (App. I, infra, p. A. 19) However, the fact of a strike by the discharged teachers has never been contested by respondents, and the Wisconsin Supreme Court necessarily conceded that respondents did strike. (App. I, infra, p. A. 2)[4]

[3]The Wisconsin Supreme Court also considered and rejected a claim by respondents, not raised in the Circuit Court, that they had been denied equal protection of the laws.

[4]See also Appendix VI, a recent Appeal Tribunal Decision by the Wsconsin Department of Industry, Labor and Human Relations, in which a member of the respondent class was denied unemployment compensation benefits because he engaged in an unlawful strike and was therefore discharged for misconduct.

The Wisconsin Supreme Court held that the board was constitutionally prohibited from making the decision to discharge. The court relied on the statement in *Morrissey v. Brewer*, 408 U.S. 471 (1972), that it was essential ". . . even in cases of undisputed or stipulated facts, that an impartial decisionmaker be charged with the responsibility of determining what action shall be taken on the basis of those facts." (App. I, infra, p. A. 24) The court said the available review of the school board's decision[5] would not "provide for review to determine whether another course of action such as mediation, injunction, continued collective bargaining or arbitration would have been a more reasonable response on the part of the decisionmaker." (App. I, *infra*, p. A. 27) The court held that *Morrissey* requires that "an impartial decisionmaker be charged with the responsibility of determining what action shall be taken . . . ." (App. I, *infra*, p. A. 24)

The court stated, "this is not to suggest, of course, that the board members were anything but dedicated public servants, trying to provide the district with quality education while still keeping within its limited budget." (App. I, infra, p. A. 24) There is no allegation or finding of a personal bias on the part of the members of the school board.

Despite the absence of a specific bias, despite the fact that the state statute (Wis. Stat. 118.22 (2)) required that only the elected school board could make the decision to discharge, and solely because the school board was bargaining and was required by statute to bargain with

[5]Wisconsin law provides for review by filing a prohibited practices complaint which could allege either antiunion motivation (Wis. Stat. Sec. 111.70(3) (a)3.) or breach of collective agreement (Wis. Stat. Sec. 111.70(3) (a)5.). App. V, *infra*, p. A. 83). Judicial review under State law of certiorari (App. I, *infra*, p. A. 27). The Hortonville strikers have never filed any prohibited practice complaint against the petitioners on any aspect of the bargaining or strike.

the union which represented the striking employees, the Wisconsin Court held that: ". . . the Board was not an impartial decisionmaker in a constitutional sense . . ." (App. I, *infra*, pp. A. 24-25)

The decision of the Wisconsin Supreme Court is a final decision. *Hudson Distributors, Inc. v. Eli Lilly & Co.*, 377 U.S. 386, 389 n.4 (1964). The Wisconsin Supreme Court decided all issues of state law in favor of petitioners, so that if the federal due process decision is wrong, there would be nothing left to litigate. *Local No. 438 v. Curry*, 371 U.S. 541, 550-51 (1963).

The Wisconsin Supreme Court remanded the case for amended pleadings (App. I, *infra*, p. A. 29) to raise new, nonconstitutional issues. In effect, any litigation after remand would be a new action for purposes of appealability. The trial court could not change the resolution of the constitutional issue here presented, yet the trial ordered would be long, complex, and pointless if the due process decision was incorrect. *Mercantile National Bank v. Langdeau*, 371 U.S. 555, 558 (1963).

After *Withrow v. Larkin*, 43 U.S.L. Week 4459-67 (U.S. April 16, 1975), was decided, petitioners asked the Wisconsin Supreme Court for a stay for the purpose of filing this Petition. Petitioners and respondents both cited *Withrow* in submissions to the Wisconsin Court respecting the requested stay. The Wisconsin Supreme Court granted the stay. (App. IV, *infra*, p. A. 82)

REASONS FOR GRANTING THE WRIT

A. The decision of the Wisconsin Supreme Court in this case seriously misconstrues this Court's decisions in *Arnett v. Kennedy*, 416 U.S. 134 (1974), and *Morrissey v.*

Brewer, 408 U.S. 471 (1972), as construed by this Court in *Withrow v. Larkin*, decided after the Wisconsin Supreme Court decision in this case.

The decision in *Arnett* should be directly controlling. Here, as in *Arnett*, the same Wisconsin statute which conferred upon respondents whatever property right they may have had to continued employment, also established that aspect of the discharge procedures which respondents here attack—the school board's *exclusive* authority to discharge teachers. (Compare the Opinion of Mr. Justice Rehnquist.)

Here, too, as in *Arnett*, the public interest in continued operation of the public schools supports the procedures in question. (Compare the Opinion of Mr. Justice Powell.) The school board members are elected officials whose sole mandate is to provide universal public education within the bounds of an acceptable school budget. Petitioners here faced an unlawful strike which closed the schools. The striking teachers were then under one-year contracts. Three days before the strike, they had been offered renewal contracts as required by State law. See Wis. Stat. § 118.22 (2). App. I, at p. A. 9, *infra*. The question whether to hire replacement teachers could not be divorced from the question whether to discharge respondents,[6] and both issues went to the very essence of the responsibilities assigned to the school board under State law. Indeed, the literal meaning of the Wisconsin Supreme Court's opinion is that elected school officials are barred by the Federal

[6]Respondents have publicly claimed they are entitled to back pay for 1974 and 1975, a period in which petitioners hired and paid replacement teachers. Thus, the Wisconsin Supreme Court's interpretation of the Federal Constitution threatens to bankrupt this small school district.

Constitution from carrying out the most important part of the duties which the citizens of Wisconsin have conferred upon them!

Morrissey v. Brewer does not require such a result. In the first place, this Court in *Morrissey* if anything confirmed the constitutionality of a school board as decisionmaker. At issue in *Morrissey* was the impartiality and independence of a single, involved parole officer. This Court held that the parole revocation function requires "a 'neutral and detached' hearing body *such as a traditional parole board, members of which need not be judicial officers or lawyers,*" 408 U.S. at 489 (emphasis added). In this case, the hearing and decision to discharge were conducted by the school board, not by the school superintendent. The analogy to procedures approved by this Court in *Morrissey* is clear.

In the second place, this case does not involve the issue presented in *Morrissey*—"when review of an initial decision is mandated, [whether] the decisionmaker must be other than the one who made the decision under review," *Withrow v. Larkin*, 43 U.S.L. Week at 4466 n.25. Likewise, this case is distinguishable from *Pickering v. Board of Education*, 391 U.S. 563 (1968), where "the trier of fact was the same body that was also . . . the victim of appellant's statement," *Withrow v. Larkin*, 43 U.S.L. Week at 4465 n. 19. Rather in this case, like *Withrow*, the only impartiality of which petitioner school board is accused is the fact that it must take into account its statutory obligations to operate the public schools and to engage in collective bargaining in making its decisions to hire and to fire individual teachers. Petitioners submit that the Constitution does not prohibit such logical grouping of

governmental functions. Indeed, an intelligent democracy requires it.

B. Employers in private business have the right to permanently replace economic strikers, even though the strike is not only legal, but protected by federal statute. *N.L.R.B. v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938). If procedural due process prohibits government employers from effectively replacing strikers, then unlawful strikes will be better protected than lawful strikes. And legislatures will be unable to change the rule, except by refraining from granting property rights to employees.

Where, as here, the strike is unlawful, the strikers have been notified they are believed to be striking, and they do not deny it, the rule should be they have abandoned their property for procedural due process purposes. The New Hampshire Supreme Court so held in *Farrelly v. Timberland Regional School District*, 324 Atl.2d 723 (1974). The Labor Management Relations Act has a similar provision. 29 U.S.C. Sec. 158(d) provides that any employee who strikes within the "cooling off" period ceases to be an employee for purposes of the Act. Such a rule would not hurt the public, since strikers could be rehired on any terms agreed to.

Even if a property interest remains after a strike begins, government employers who have the responsibility to run the public schools, including the hiring and firing of teachers, should not be prohibited from carrying out these obligations merely because they also have the duty to set employment terms through bargaining with the union which represents strikers. *Withrow v. Larkin, supra.*

C. This Court has not decided whether the bare pres-

ence of two functions vis a vis a public employee (in this case setting terms of employment through bargaining, and discharging) itself disqualifies a decisionmaker. Issues surrounding the discharge of striking public employees are being litigated frequently, and with varying results on the "impartial decisionmaker" question.

New Hampshire in *Farrelly* held striking was abandonment of tenure. The Court of Appeals for the District of Columbia Circuit decided in *Bullock v. Mumford*, 509 F.2d 385, *rehearing en banc denied*, 509 F.2d 388 (D.C. Cir. 1974, 1975), that Library of Congress officials could discharge employees who struck to protest alleged race discrimination by the Library officials.

The New York Court of Appeals in *Sanford v. Rockefeller*, N.Y. ——, 88 L.R.R.M. 2181 (1974), *appeal dismissed*, 89 L.R.R.M. 2300 (U.S. 1975), decided after remand by this Court, 416 U.S. 977 (1974), that the government employer could discipline striking employees where review of the decision was not *de novo*.

The Supreme Court of Michigan recently held that firing of strikers by a school board did not violate due process. *Rockwell v. Crestwood School District*, — Mich. —, 227 N.W.2d 736 (1975).

The United States District Court for the Western District of Michigan held in *Federation of Teachers v. Community College*, 88 L.R.R.M. 2873 (1974), that a college which discharged striking teachers was constitutionally required (because the court, based upon factual proof, found antiunion motivation) to file an action in a state court asking for a declaratory judgment whether or not the strike was illegal.

The Court of Appeals for the Seventh Circuit held in

Shirck v. Thomas, 447 F.2d 1025, 1028 (1971), that an employee is not entitled to a wholly independent fact-finding tribunal. In *Johnson v. Board of Regents*, 377 F. Supp. 227 (W.D. Wis. 1974), the court held that a university chancellor, who had participated in a decision to lay off employees, could decide who should be laid off.

The Hortonville case demonstrates the dilemma which the nation's governmental employers face so long as the "process due" striking government employees is not defined by this Court. School boards should be responsive to their constituents, and must operate the schools. Simultaneously, they are in many states required to bargain with unions. Faced with a strike, school boards must make difficult policy decisions quickly, yet they and their schools face potential liability unless this Court clarifies the procedural parameters within which such decisions must constitutionally be made.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX I

NO. 635

August Term, 1974

STATE OF WISCONSIN: IN SUPREME COURT

HORTONVILLE EDUCATION ASSN., et al.,
Appellants,

v.

HORTONVILLE JOINT SCHOOL DISTRICT No. 1, et al ,
Respondents,

APPEAL from a judgment and an order of the circuit court for Outagamie county: ALLAN J. DEEHR, Circuit Judge of the Fourth circuit, Presiding. *Judgment reversed, order affirmed.*

This is a class action which grew out of a municipal labor dispute at Hortonville, Wisconsin, involving on one side the public school teachers in the Hortonville Joint School District No. 1 and their representative and bargaining agent, the Hortonville Education Association (HEA), and on the other side the Hortonville Joint School District No. 1 and its representative and bargaining agent, the Board of Education of Hortonville Joint School District No. 1.

The labor dispute began in January, 1974, over the 1973-1974 and the 1974-1975 teachers' contracts. Collective bargaining did not resolve the dispute and in March, 1974, a substantial number of teachers engaged in a strike. The school board discharged over 80 teachers represented by the appellant HEA. This action was commenced to de-

clare the action of the school board null and void and for reinstatement of the teachers

The trial court granted the school board's motion for summary judgment as to the teachers' first cause of action and sustained the demurrers to the other three causes of action.

The appellants Michael Wisnoski, Rose Marie Olson, Thomas Nadeau, Judy Murphy, Russel Lichte and Ronald Hammond are teachers who were discharged by the board and represent all former Hortonville teachers similarly situated. Respondents Roger Weihing, Robert Hauk, Jean Meads, Floyd Meyer, Merlin Plamann, Victor Schroth and Ronald Surprise are members of the school board. Respondent Robert Kahes is the Hortonville High School Principal. Respondent Eugene Riedl is the Hortonville Junior High School and Elementary School principal. Respondent Marvin Obry is superintendent of the district.

The material facts, as they appear from the pleadings, the affidavits and other documents filed in support of and in opposition to the motion for summary judgment, are not in dispute. In January, 1974, negotiations between the HEA and the school board were in progress to reach a collective bargaining agreement on 1973-1974 and 1974-1975 teaching contracts. From about January 24 to January 30, the HEA engaged in "informational picketing," which did not interrupt any teaching activities. On Monday, March 18, the teachers went on strike. On March 20, the school district superintendent, at the direction of the board, sent letters to the teachers inviting them to return to their jobs. Several teachers did return on Friday, March 22nd.

On March 23rd, the superintendent, again at the direction of the board, sent a letter to each teacher again in-

viting them to return to work and advising them that strikes by public employees were illegal and that the board would not "condone unlawful activity" by its employees. None of the 86 teaching employees then on strike returned to work in response to said letter. On Tuesday, March 26th, and Wednesday, March 27th, classes were conducted for most students through the use of substitute teachers.

At a special school board meeting on Friday, March 29th, the board decided to schedule disciplinary hearings for each individual teaching employee then on strike. Notices[1] of the individual hearings were addressed to each teaching employee and specified the purpose of the hearing and the time at which he or she was to appear. The hearings, which were scheduled twenty minutes apart, were to be held on Monday, April 1, Tuesday, April 2, and Wednesday, April 3. The notices were delivered to the Outagamie county sheriff's department on Friday, March 29th, with a request that they be served as soon as possible. Twenty-three of the notices were served on Friday, March 29th, forty-four were served on Saturday, March 30th, twenty on Monday, April 1st, and one on Tuesday, April 2nd. The HEA was not notified of the hearing.

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[1] "The Board of Education for the Hortonville Community Schools has been informed by Superintendent Obry that since March 18, 1974:

"You have breached your individual employment contract;

"You have engaged in an unlawful strike contrary to Wisconsin law.

"This alleged conduct, if true, subjects you to disciplinary action by the Board, including termination of your employment contract.

"You are hereby notified that the Board of Education has set a hearing on this matter for ———, April —, 1974, at — o'clock in the ——noon, or as soon thereafter as you may be heard, at the high school library, 246 North Oik Street, Hortonville.

"At this hearing you will be given the opportunity to present any statement or evidence relevant to this alleged conduct.

"Be further advised that after such hearing the Board will notify you in writing of what disciplinary action, if any, the Board has determined appropriate."

On Monday morning, April 1st, almost all the teaching employees represented in this class action appeared before the board en masse with their retained counsel and indicated, through him, that they would refuse to answer questions that they did not want individual hearings but rather preferred to be treated as a group. Their counsel also objected, on due process grounds, that the teaching employees did not receive fair notice of the hearings and that they were entitled to an impartial decisionmaker to determine the appropriate disciplinary measures, if any. Counsel for the teachers alleged that the work stoppage was provoked by the board's conduct, and sought to examine members of the board to establish that fact. This request was refused, but counsel was allowed to make an offer of proof regarding the unsatisfactory nature of the board's contract offers, its allegedly coercive and unlawful bargaining techniques, and an allegation that teachers were locked out of their places of employment. The board refused to consider the offer of proof and the hearing adjourned at 1:20 p.m.

On Tuesday morning, April 2nd, counsel for the teachers appeared before the board with four other teaching employees who had not appeared the previous day. These individuals all indicated that they took the same position as the other teachers and wished to be considered with the others.

On Tuesday afternoon, April 2nd, the board held a special meeting at which it adopted a resolution terminating the employment of the teachers in the class represented by appellants here. Letters were sent to such teachers indicating that their employment was terminated

and that their offers of employment or contracts for the 1974-1975 school year were revoked or terminated.[2]

On April 5th the board held a hearing for a teacher who had erroneously been excluded from all prior action and proceeding. The teacher, through the counsel who represented the other teachers, indicated she wished to take the same position as the others, and was therefore discharged.

Thereafter, the board began hiring replacement teachers and school reopened on April 8, 1974. Only one of the discharged teachers reapplied for employment and he was rehired.

In the first cause of action in their amended complaint, the plaintiffs-appellants, the HEA and the named teachers-plaintiffs as class representatives, alleged that the circumstances of the hearing and discharge constituted a deprivation of their property and liberty without due process of law as guaranteed under the Fourteenth Amend-

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[2]"Please be advised that the Board of Education met on April 2, 1974, and took the following action:

"The Board found you guilty of the conduct set forth in Mr. Weihing's notice of March 29, 1974. Specifically, it found that since March 18, 1974:

"You breached your individual employment contract;

"You engaged in strike activity contrary to Wisconsin law.

"Therefore, you are advised that your employment with the Hortonville Community Schools, Joint School District #1, Village of Hortonville, et al., is hereby terminated, effective immediately. Furthermore, this action includes the withdrawal of the offer of employment for the 1974-75 school term, and/or termination of such tendered employment contract. Be further advised that your district-paid WPS hospital insurance coverage will cease on April 30, 1974, unless you make contrary arrangements with the insurance company. Information regarding other fringe benefits will be forthcoming to you in the near future.

"The Board also directed the administration to commence recruitment, both from within and outside the district, for professional staff for the balance of the 1973-74 school year and thereafter. You are invited to apply for any teaching position if you are interested in further employment in our district. You should contact Superintendent Obry or a principal if you wish to so apply."

ment of the United States Constitution and art. I of the Wisconsin Constitution. In the third cause of action, the appellants alleged that conduct of the board on Tuesday afternoon, April 2nd, constituted a violation of the open meeting law, sec. 66.77, Stats. The appellants sought, as relief, a declaration that the board's action was null and void, an order that the discharge of the teachers be set aside, an injunction proscribing the board from hiring additional replacements, an order that the contracts of the replacements be rescinded, an order requiring the parties to select an impartial decisionmaker to determine whether three was "just cause" for the discharge, and such other relief as might be appropriate.

The trial court granted the respondent-school board's motion for summary judgment on the first cause of action and sustained its demurrer to the third. The other causes of action stated in the amended complaint are not at issue here

The plaintiffs appeal from the judgment and order.

BEILFUSS, J. The issues in this court are.

1. Does Wisconsin law allow the discharge of municipal employees who engage in a strike?

2. Does the action by the Hortonville school board in discharging teachers instead of obtaining a judicial order constitute selective enforcement of the Wisconsin prohibition of the right to strike, thereby denying to the teachers their right to equal protection of the laws?

3. Does the state's prohibition against strikes by teachers, without provision for binding arbitration and *de novo* review of reasonableness of punishment, when such benefits are provided for other public employees, con-

stitute a violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution?

4. Were the strikers denied due process of law because they were discharged by the Hortonville school board which is not a neutral, impartial and detached decisionmaker?

5. Did the action taken by the Hortonville board of education constitute a violation of the open meeting law?

The general rule is that issues not presented to the trial court will not be considered for the first time on appeal. *Estate of Scherffius* (1974), 62 Wis.2d 687, 696, 697, 215 N.W.2d 547; *Resseguie v. American Mut. Liability Ins. Co.*, (1971), 51 Wis.2d 92, 103, 104, 186 N.W.2d 236. With respect to constitutional issues, this court had said it may, in its discretion consider such issues for the first time on appeal if it is in the interest of justice to do so and there are no unresolved factual issues. *State v Morales* (1971), 51 Wis.2d 650, 654, 187 N.W.2d 841; *Bradley v. State* (1967), 36 Wis.2d 345, 359, 359a, 153 N.W.2d 38, 155 N.W.2d 564. We believe, in this case, it is in the interest of justice to consider the issues raised as set forth above.

Does Wisconsin law allow the discharge of municipal employees who engage in a strike?

As to all municipal employees, sec. 111.70 (4) (1). Stats., provides:

> 'Strikes prohibited. Nothing contained in this subchapter shall constitute a grant of the right to strike by any county or municipal employe and such strikes are hereby expressly prohibited."

As to state empolyees, sec. 111.89, Stats., provides: "*Strike prohibited.* (1) Upon establishing that a strike

is in progress, the employer may at his option either seek an injunction or file an unfair labor practice charge with the commission under s. 111. 84 (2) (e) or both. In this regard it shall be the responsibility of the department of administration to decide whether to seek an injunction or file an unfair labor practice charge. The existence of an administrative remedy shall not constitute grounds for denial of injunctive relief.

"(2) The occurrence of a strike and the participation therein by a state employe do not affect the rights given to the employer to deal with the strike, including:

> "(a) The right to impose discipline, including discharge, or suspension without pay, of any employe participating therein;
>
> "(b) The right to cancel the reinstatement eligibility of any employe engaging therein; and
>
> "(c) The right of the employer to request the imposition of fines, either against the labor organization or the employe engaging therein, or to sue for damages because of such strike activity."

The appellants contend that since employers of state employees are specifically given the right to discharge in the event of a strike, while no similar provision applies to municipal employees, that municipal employers are not allowed to discharge striking employees but are restricted to the remedy of injunction.

The respondents cite *Millar v. Joint Schol Dist.* (1957), 2 Wis.2d 303, 312, 86 N.W.2d 455, for the proposition that:

> "A school board has implied power to dismiss a teacher before the expiration of his term of service for good and sufficient cause. . . . If a teacher fails to perform his duties under his contract, the board may discharge him from further service."

They further contend that sec. 111.70 (4) (1), Stats., in no way diminishes that right. We believe they are correct in that contention. Sec. 118.22 (2) provides:

"On or before March 15 of the school year during which a teacher holds a contract, the board by which the teacher is employed or an employe at the direction of the board shall give the teacher written notice of renewal or refusal to renew his contract for the ensuing school year. If no such notice is given on or before March 15, the contract then in force shall continue for the ensuing school year. A teacher who receives a notice of renewal of contract for the ensuing school year, or a teacher who does not receive a notice of renewal or refusal to renew his contract for the ensuing school year on or before March 15, shall accept or reject in writing such contract not later than the following April 15. No teacher may be employed or dismissed except by a majority vote of the full membership of the board. Nothing in this section prevents the modification or termination of a contract by mutual agreement of the teacher and the board. No such board may enter into a contract of employment with a teacher for any period of time as to which the teacher is then under a contract of employment with another board."

The reference to the fact that a teacher may be "dismissed" clearly indicates the existence of the right to discharge. Both *Millar, supra,* and *Richards v. Board of Education* (1973), 58 Wis.2d 444, 460b, 206 N.W.2d 597, indicate clearly that the term "dismiss" means to remove from employment and not to merely refuse to renew a contract.

Furthermore, the power of the board to discharge a teacher for "just cause" is clearly preserved in the master contract[3] between HEA and the school district.

From the statutes, the cases cited, and the contract, we conclude the school board did have the power to discharge the teachers who engaged in the prohibited strike.

The appellants contend the action by the Hortonville school board in discharging the teachers instead of obtaining a judicial order constitutes selective enforcement of the Wisconsin prohibition of the right to strike, thereby denying to the teachers their right to equal protection of the laws as guaranteed by the state and federal constitutions.

The appellants argue that this is the first known instance in Wisconsin where striking teachers have been discharged They assert that the usual procedure is for the school board to seek an injunction, and that the deviation from this practice in this case amounts to selective enforcement of the law and a denial of equal protection.

The respondents, in argument, deny this is the first instance of discharge because of strike activity. They also urge that there is an unresolved factual dispute involved, *i.e.*, what is the normal procedure in the case of teacher strikes. For the purpose of this opinion, we will assume the factual allegation of the appellants is correct.

Several factors bear on the question of whether the discharge amounted to a denial of equal protection due to selective enforcement of the law. The basic question that must be answered in the affirmative before a denial of

[3]The master agreement, while contained in the record at pages 214-225, was not part of or appended to either of the affidavits filed with respect to the motion for summary judgment. However, because we have decided to determine the issues raised upon appeal, this document should be considered.

equal protection can be found is whether a difference in treatment amounts to invidious discrimination. *Harper v. Virginia Board of Elections* (1966), 383 U.S. 663, 666, 86 Sup. Ct. 1079, 16 L.Ed.2d 169.

Arguably at least, there were other remedies the school board could have pursued. It could have sought an injunction, it could have sought fact-finding and mediation before the Wisconsin Employment Relations Commission,[4] it could have continued collective bargaining or it could have discharged the teachers for violating the statutory prohibition against public employee strikes as was done here. The fact the school board pursued one of the remedies does not *ipso facto* mean the teachers were denied equal protection. This is especially true in this case because we do not have a record which reveals all the pertinent and relevant facts upon which the board acted What might be a fair and reasonable response on the part of the board might not be under a different factual background. Further, the right to discharge here is essentially contractual. Whether the master contract between the board and the school district and the contracts between the individual school teachers and the districts are comparable cannot be determined from the record in this case.

With one exception not material here, all of the striking teachers were treated the same. They were all given the same notices, all had the same opportunity to be heard, all were discharged and all given the right to apply for reinstatement. The record does not reveal invidious discrimination and no denial of equal protection appears.

The appellants also contend that they were denied equal protection of the law in two additional respects: First, in

[4]Sec. 111.70, Stats. *See also, Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B.* (1967), 35 Wis. 2d 540, 151 N.W. 2d 617.

that they are denied the right to strike, contrary to their counterpart in the private sector; and, second, in that they are denied certain benefits, *e.g.*, binding arbitration, which are accorded to other public employees, *i.e.*, police and fiermen.

Absent a suspect classification or a fundamental right, neither of which are involved in this case,[5] this court has held that:

> " . . to declare an act of the legislature as to a classification violative of the equal-protection clause, it is first necessary to prove that the legislature has abused its discretion beyond a reasonable doubt."

State ex rel. La Follette v. Reuter (1967), 36 Wis.2d 96, 111, 153 N.W.2d 49. *See also, Wiener v. J. C. Penney Co.* (1974), 65 Wis.2d 139, 147, 222 N.W.2d 149. There is a strong presumption of constitutionality which attaches to acts of the legislature, unless the court can say that no statement of facts can reasonably be conceived that would sustain it. *Weiner, supra,* page 147; *State ex rel. Hammermill Paper Co. v. La Plante* (1973), 58 Wis.2d 32, 46, 205 N.W.2d 784. Only if a classification is arbitrary and has no reasonable purpose or reflects no justifiable public policy will it be held violative of constitutional guarantees of equal protection. *Simanco, Inc. v. Department of Revenue* (1973), 57 Wis.2d 47, 57, 203 N.W.2d 648. In *Wiener, supra,* page 147, this court reiterated five standards necessary for a proper classification:

[5]*See Warshafsky v. The Journal Co.* (1974), 63 Wis.2d 130, 216 N.W. 2d 197; *United Federation of Postal Clerks v. Blount* (D.C. D.C. 1971), 325 Fed. Supp. 879, affirmed (1971), 404 U.S. 802, 92 Sup. Ct. 80, 30 L. Ed. 2d 38.

> "(1) All classifications must be based upon substantial distinctions which make one class really different from another.
>
> "(2) The classifications adopted must be germane to the purpose of the law.
>
> "(3) The classifications must not be based upon existing circumstances only. They must not be so constituted as to preclude additions to the numbers included within a class.
>
> "(4) To whatever class a law may apply, it must apply equally to each member of thereof.
>
> "(5) The characteristics of each class should be so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation." *See also, Dane County v. McManus* (1972), 55 Wis.2d 413, 423, 198 N.W.2d 77; *State ex rel. Ford Hopkins Co. v. Mayor* (1937), 226 Wis. 215, 222, 276 N.W. 311.

Considering appellants' contentions in reverse order, they claim that teachers are denied equal protection because, unlike police and firemen, they are not accorded binding arbitration[6] or other dispute settlement rights. The different treatment accorded police and firemen is "based upon substantial distinctions which make one class really different from another." *Weiner, supra,* page 147. It is not difficult to find a rational basis for the legislation. If police or firemen go on strike the imminent and immediate danger to the community is so great that every reasonable measure must be taken to get them back on the job

[6]*See* secs. 111.70 (4) (jm) and 111.77, Stats.

as soon as possible, or to prevent them from striking in the first instance. The classification is not unreasonable and is a legitimate exercise of the legislative function.

A more difficult question arises with respect to the appellants' contention that they are denied equal protection, vis-a-vis nonpublic employees, by the application of the strike ban contained in sec. 111.70 (4) (1), Stats.

Several rationales are typically propounded in support of no-strike laws for public employees. One relies on the sovereignity of the governmental employee and reasons that the government, unlike the private employee, cannot suspend operations nor go out of business nor increase its budgets, and therefore is entitled to expect a higher level of devotion to service. *Norwalk Teachers' Assn. v. Board of Education* (1951), 138 Conn. 269, 83 Atl.2d 482. Another rationale is that the peculiar nature of the government, as opposed to private employers, makes it particularly vulnerable to the strike.

> ". . . In the private sector, union demands are usually checked by the forces of competition and other market pressures. Negotiators are typically limited by such restraints as the entry of non union competitors, the impact of foreign goods, the substitution of capital for higher-priced labor, the shift of operations to lower-cost areas, the contracting out of high-cost operations to other enterprises, the shutdown of unprofitable plants and operations, the redesign of products to meet higher costs, and finally the managerial option to go out of business entirely. Similar limitations are either nonexistent or very much weaker in the public sector. While budgets and corresponding tax levies operate in a general way to check increases in compensation, the connection is remote and scarcely applicable to particular units of groups of strategically located public employees. unhampered by such market restraints, a union that can exert heavy pressure through a strike may be able to obtain excessive wages and benefits." Cox and Bok, *Labor Law* (7th ed), pages 970, 971.

An additional rationale is that public employees have adequate opportunity to achieve their aims through the legislative process. *Note: The Strike and Its Alternatives in Public Employment,* 1966 Wisconsin Law Review, 549, 556. It is also often stated that the strike ban protects the public health, safety and welfare.

The position of the appellants is that neither these nor any other rationales can support the validity of the strike ban, at least with respect to them. They concede, of course, that a strike by police or firemen may result in real, immediate and irreparable harm to the community, and thus admit that the strike ban is valid as applied to those types of emergency services. They argue, however, that the statute is too broad in its scope.

Many courts have considered this issue and none have found a denial of equal protection. *See:* Annot. (1971), Labor Law: Right of Public Employees to Strike or Engage in Work Stoppage, 37 A.L.R.3d 1147. As stated in *United Federation of Postal Clerks v. Blount, supra,* page 883:

> "Given the fact that there is no constitutional right to strike, it is not irrational or arbitrary for the Government to condition employment on a promise not to withhold labor collectively, and to prohibit strikes by those in public employment, whether because of the prerogatives of the sovereign, some sense of higher

obligation associated with public service, to assure the continuing functioning of the Government without interruption, to protect public health and safety or for other reasons. Although plaintiff argues that the provisions in question are unconstitutionally broad in covering all Government employees regardless of the type or importance of the work they do, we hold that it makes no difference whether the jobs performed by certain public employees are regarded as 'essential' or 'non-essential,' or whether similar jobs are performed by workers in private industry who do have the right to strike protected by statute. . . . The Equal Protection Clause, however, does not forbid all discrimination. Where fundamental rights are not involved, a particular classification does not violate the Equal Protection Clause if it is not 'arbitrary' or 'irrational,' i.e., 'if any state of facts reasonably may be conceived to justify it.' McGowan v. Maryland, 366 U.S. 420, 426, 81 S. Ct. 1101, 1105, 6 L.Ed.2d 393 (1961). . . ."

We conclude there is a meaningful distinction between governmental employees and nongovernmental employees. The strike ban imposed on public employees is based upon a valid classification and the legislation creating it is not unconstitutional as a denial of equal protection. If the no-strike ban legislatively imposed on public employees is to be absolished or altered, it must be done by the legislature and not the courts.

The teachers contend they were denied due process of law because the hearings were not considered and their discharges ordered by an impartial decisionmaker.

The Fourteenth Amendment to the United States Constitution provides, *inter alia,* that no state shall deprive

any persons of property or liberty without due process of law. Before it can be determined whether the appellants were denied due process, it must be established that they were entitled to due process of law in that they were deprived of their property or liberty by state action.

State action is clearly present in this case. The Hortonville Joint School District No. 1 is organized under the laws of the state of Wisconsin and is a municipal employer as defined in sec. 111.70, Stats. The school board is charged under chs. 118 and 120 with the management of the school district. The district, the board and their agents are therefore extensions of the state.

With respect to the question of deprivation of property, we refer to *Board of Regents v. Roth* (1972), 408 U.S. 564, 92 Sup. Ct. 2701, 33 L.Ed.2d 548, and *Perry v. Sindermann* (1972), 408 U.S. 593, 92 Sup. Ct. 2694, 33 L.Ed. 2d 570. In *Roth,* the court decided that a nontenured assistant professor was not entitled to procedural due process when his one-year teaching contract was not renewed. The court stated:

> "The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests—property interests—may take many forms.
>
> ". . . To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely on their daily lives, reliance

that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

"Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. . . ." *Roth, supra,* pages 576, 577.

In *Perry, the court added:*

"A written contract with an explicit tenure provision clearly is evidence of a formal understanding that supports a teacher's claim of entitlement to continued employment unless sufficient 'cause' is shown. Yet absence of such an explicit contractual provision may not always foreclose the possibility that a teacher has a 'property' interest in re-employment. For example, the law of contracts in most, if not all, jurisdictions long has employed a process by which agreements, though not formalized in writing, may be 'implied.' 3 A. Corbin on Contracts, secs. 561-572A (1960). Explicit contractual provisions may be supplemented by other agreements implied from 'the promisor's words and conduct in the light of the surrounding circumstances.' *Id.,* at sec. 562. And, '[t]he meaning of [the promisor's] words and acts is found by relating them to the usage of the past.' *Ibid.*" *Perry, supra,* pages 601, 602, *See also, Pelisek v. Trevor State Graded School Dist. No. 7* (E.D Wis. 1974), 371 Fed. Supp. 1064.

In *Wieman v. Updegraff* (1952), 344 U.S. 183, 73 Sup. Ct. 215, 97 L.Ed. 216, the court held that professors removed from office during the terms of their contracts were entitled to due process. *See also, Carpenter v. City of Greenfield School District No. 6* (E.D. Wis. 1973), 358 Fed. Supp. 220.

In this case the appellant-teachers were discharged during the terms of their 1973-1974 contracts and their offers or contracts for employment for the 1974-1975 school year were revoked or rescinded. This unquestionably amounted to a deprivation of property within the intendment of the due process clause.

The respondents contend that no deprivation of property is involved because the employees, by going on strike, abandoned whatever property interest they had in continued employment. Going on strike, the respondents argue, is the equivalent of quitting, a unilateral breach of the employment contract which dissolves any property interests for due process purposes.

It is unnecessary to reach the merits of this contention, however, because the argument begs the question. One of the purposes of due process in this context is to determine whether the alleged conduct did in fact take place. To say that the performance of certain acts forecloses the requirement of a hearing to determine whether the acts were in fact performed is to engage in circular reasoning. The teachers were deprived of a constitutional property right in this case.

Another question to be considered is whether the teachers were deprived of liberty. The United States Supreme Court in *Roth, supra,* pages 573, 574, stated:

"There might be cases in which a State refused to re-employ a person under such circumstances that interests in liberty would be implicated. But this is not such a case.

"The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For '[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.' *Wisconsin v. Constantineau,* 400 U.S. 433. 437. *Wieman v. Updegraff,* 344 U.S. 183, 191. . . In such a case, due process would accord an opportunity to refute the charge before University officials. In the present case, however, there is no suggestion whatever that the respondent's 'good name, reputation, honor, or integrity' is at stake.

"Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The State, for example, did not invoke any regulations to bar the respondent from all other public employment in state universities. Had it done so, this, again, would be a different case. For '[t]o be deprived not only of present government employment but of future opportunity for it certainly is no small injury. . . .' *Joint Anti-Fascist Refugee*

Committee v. McGrath [341 U.S. 123] . . . at 185 (Jackson, J., concurring). . . "

In *Roth,* there was no stated reason for the nontenured teacher not being rehired. In the case at bar, however, the stated reasons were two: (1) The teachers had breached their contracts, and (2) they had engaged in a strike contrary to Wisconsin law. It is apparent that such charges could detrimentally affect an individual's reputation in the labor market and thereby significantly undermine his opportunities for re-employment Due process requires a notice and hearing and an opportunity for the teachers to clear themselves of such charges.

Having determined that the teachers were entitled to due process, the more difficult question of what process is due emerges. The often-quoted *Cafeteria & Restaurant Workers Union v. McElroy* (1961), 367 U.S. 886, 895, 81 Sup. Ct. 1743, 6 L.Ed.2d 1230, provides:

> ". . . consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action"

Thus a balancing test must be established to weigh the interest of the school district in summary determination against the interests of the teachers in their continued employment. Only in light of that balancing test can it be determined whether the procedures afforded the teachers failed to satisfy the constitutional requirements of due process.

With respect to those procedures, the appellants allege their constitutional inadequacy in only one respect, *i.e.*,

the lack of an impartial decisionmaker.[7] The requirement of an impartial decisionmaker is well established as an essential component of procedural due process. *See Gibson v. Berryhill* (1973), 411 U.S. 564, 578, 93 Sup. Ct. 1689, 36 L.Ed.2d 488; *Ward v. Village of Monroeville* (1972), 409 U.S. 57, 60, 93 Sup. Ct. 80, 34 L.Ed.2d 267; *Morrissey v. Brewer* (1972), 408 U.S. 471, 485, 92 Sup. Ct. 2593, 33 L.Ed.2d 484; *Goldberg v. Kelly* (1970), 397 U.S. 254, 271, 90 Sup. Ct. 1011, 25 L.Ed.2d 287. In *Morrissey*, involving the due process required to be afforded a parolee prior to revocation, the court stated:

> "In our view, due process requires that after the arrest, the determination that reasonable ground exists for revocation of parole should be made by someone not directly involved in the case. It would be unfair to assume that the supervising parole officer does not conduct an interview with the parolee to confront him with the reasons for revocation before he recommends an arrest. It would also be unfair to assume that the parole officer bears hostility against the parolee that destroys his neutrality; realistically the failure of the parolee is in a sense a failure for his supervising officer. However, we need make no assumptions one way or the other to conclude that

[7]The appellants do make brief reference to the alleged lack of timely notice, the failure of the board to present evidence against them, and the preclusion of the teachers from questioning members of the board or offering affirmative evidence. They do not argue these points, however, and the only issue raised regarding due process goes to the alleged lack of an impartial decisionmaker.

With respect to the lack of timely notice, it should be noted that although the longest notice received was four days, spanning a weekend, and the shortest was received on the day of the hearing, counsel for the teachers was asked at the hearing how much additional time he needed to prepare. Counsel replied that he would make an offer of proof and then let the board know if he needed more time. The offer was made but counsel never requested additional time thereafter.

> there should be an uninvolved person to make this preliminary evaluation of the basis for believing the conditions of parole have been violated. The officer directly involved in making recommendations cannot always have complete objectivity in evaluating them. *Goldberg v. Kelly* found it unnecessary to impugn the motives of the case worker to find a need for an independent decisionmaker to examine the initial decision." *Morrissey, supra,* pages 485, 486.

In *Ward, supra,* a case involving a situation where a city mayor was empowered to sit as judge to try ordinance violation cases, the fines from which constituted a significant part of the city's income, the court stated that the test was whether:

> ". . . [the] situation is one 'which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused. . . .' . . . ." *Ward, supra,* page 60.

It is important to note that procedural due process is not limited to the factual determination as to whether an individual did or did not engage in the particular conduct. It extends as well to the action taken by the state once that conduct is established. As stated in *Morrissey, supra,* page 488:

> "This [due process] hearing must be the basis for more than determining probable cause; it must lead to a final evaluation of any contested relevant facts and consideration of whether the facts as determined

warrant revocation. The parolee must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that violation does not warrant revocation."

Therefore it would seem essential, even in cases of undisputed or stipulated facts, that an impartial decisionmaker be charged with the responsibility of determining what action shall be taken on the basis of those facts. "The principle of fair play is an important factor in a consideration of due process of law." *General Electric Co. v. Wisconsin Employment Relations Board* (1958), 3 Wis. 2d 227, 241, 88 N.W.2d 691; *Durkin v. Board of Police & Fire Comm.* (1970), 48 Wis. 112, 122, 180 N.W.2d 1.

The background giving rise to the ultimate facts in this case reveals a situation not at all conducive to detachment and impartiality on the part of the school board. The board was the collective bargaining agent for the school district and thus was engaged in the collective bargaining process with the teachers' representative, the HEA. It is not difficult to imagine the frustration on the part of the board members when negotiations broke down, agreement could not be reached and the employees resorted to concerted activity. This is not to suggest, of course, that the board members were anything but dedicated public servants, trying to provide the district with quality education while still keeping within its limited budget. They were, however, not uninvolved in the events which precipitated decisions they were required to make. The decision to discharge was possibly a convenient alternative which would eliminate their labor problems in one fell swoop. We conclude that the board was not an impartial decisionmaker in a

constitutional sense and that the appellants were denied due process of law.

Respondents rely heavily on two cases, *Arnett v. Kennedy* (1974), 416 U.S. 134, 94 Sup. Ct. 1633, 40 L.Ed.2d 15, and *Johnson v. Board of Regents* (W.D. Wis. 1974), 377 Fed. Supp. 227, to support their contention that there is no due process violation involved in this case. In *Arnett*, a federal employee was discharged by his immediate superior because the employee allegedly made disparaging remarks about such superior. The court held that whatever expectancy of continued employment, and hence property right, the employee had in his job was created by the Lloyd-LaFollette Act (Act of Aug. 24, 1912, c. 389, sec. 6, 37 Stat. 555. now 5 U.S.C., sec. 7501), which provides in pertinent part at page 150:

" '[N]o person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; but no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal; . . .' "

The three justices who constituted the plurality in *Arnett* stated with respect to due process:

". . . the very section of the statute which granted him that right, a right which had previously existed

only by virtue of administrative regulation, expressly provided also for the procedure by which 'cause' was to be determined, and expressly omitted the procedural guarantees which appellee insists are mandated by the Constitution. Only by bifurcating the very sentence of the Act of Congress which conferred upon appellee the right not to be removed save for cause could it be said that he had an expectancy of that substantive right without the procedural limitations which Congress attached to it. . . ." *Arnett, supra,* page 152.

The plurality thus concluded that extent of the property right was limited by the act itself, and hence due process was not required. There is no analogous situation here.

In *Johnson*, the chancellors of the various campuses in the state university system were faced with budget cuts, and thus had to determine how to effectuate them. The plaintiff-professor was discharged by his chancellor as a result of such situation. With respect to the plaintiff's claim that the chancellor was an impartial decisionmaker, the court stated at page 240:

> "The initial decision obviously had to be made by someone and the chancellor was a wholly appropriate choice."

There is nothing in that case, however, to suggest a potential for bias or impartiality as in the case at bar and thus it is inapposite.

The respondents and amici curiae argue that the existence of postdetermination review procedures ameliorate any impartiality in the original determination. An analysis

of the two procedures suggested, however, reveals their inadequacy. The first is the common-law writ of certiorari. The scope of review by certiorari is limited to determining:

> ". . .'. . . (1) Whether the board kept within its jurisdiction; (2) whether it proceeded on correct theory of law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question.' " *State ex rel. Ball v. McPhee* (1959), 6 Wis.2d 190, 199, 94 N.W.2d 711. *See also State v. Goulette* (1974), 65 Wis.2d 207, 222 N.W.2d 622.

The second suggested procedure—review by the Wisconsin Employment Relations Commission under sec. 111.70 (4), Stats. Such procedure applies only in the case of employee prohibited practices, however. Neither of these alternatives provide for review to determine whether another course of action such as mediation, injunction, continued collective bargaining or arbitration would have been a more reasonable response on the part of the decisionmaker. In light of that fact, it is difficult to see how either review by common-law certiorari or by the WERC[8] can replace an impartial decisionmaker in the first instance.

When the teachers went on strike, the school board was undoubtedly faced with a situation that needed immediate attention. Clearly, it had a duty to keep the schools open and staff them with competent teachers. If the schools were closed so that the statutory minimum number of

[8]But *see: Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B., supra.*

school days was not reached, monetary state school aid would have been denied or jeopardized leading to a severe budget crisis. True, it could have sought an injunction or gone to the WERC for some relief, but neither the courts nor the WERC could hire or fire teachers. Sec. 118.22 (2), Stats., provides in part:

"No teacher may be employed or dismissed except by a majority vote of the full membership of the board."

Assuming the school board did recognize, under this factual background, that it was not an impartial decision-maker or hearing officer as constitutionally contemplated, where was it to go to obtain an authorized impartial hearing officer or decisionmaker? The answer is that the law as it presently exists does not provide for one. Legislation could establish a necessary forum and procedures directly or by delegation to a proper department of government, but it does not.

When an adequate remedy or forum does not exist to resolve disputes or provide due process, the courts, under the Wisconsin Constitution,[9] can fashion an adequate remedy.

The plaintiffs-appellants contend that part of sec. 118.22 (2), Stats., which gives the school the exclusive right to hire and fire, is unconstitutional in that it denies due process. If the statute can be construed or procedures

[9]Sec. 9, art. I, Wis. Constitution, states: "Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws." *See also: State ex rel. Wickham v. Nygaard* (1915), 159 Wis. 396, 150 N.W. 513; *Wisconsin Telephone Co. v. Public Service Comm.* (1939), 232 Wis. 274, 287 N.W. 122, 287 N.W. 593; *Huebner v. State* (1967), 33 Wis. 2d 505, 147 N.W. 2d 646.

provided to meet a valid constitutional objection, it should be done.

We believe the school board should make the initial determination as to the hiring or firing of one or many teachers. In those situations where due process is required, namely where the employed teacher's property right or liberty is at stake—notice, a hearing and a statement of reasons should be given. As much control as possible should be left with the school board to set policy and manage the school.

In those situations where an employed teacher is discharged or otherwise disciplined and due process is required, and the school board is in an adversary position, we hereby provide and direct that the dissatisfied teacher or teachers can, upon petition, obtain a *de novo* determination of all issues in any court of record in the county where the school district or a part of it is located. The issues shall be determined by the court without a jury, unless the judge determines to call a jury and receive an advisory verdict. The court shall resolve any factual disputes and provide for a reasonable disposition.

The trial of the contested issues shall be given a trial date preference consistent with the reasonable administration of the court's calendar.

This method of disposition is not ideal because a court may be required to make public policy decisions that are better left to a legislative or administrative body. However, because a fundamental constitutional protection is involved and no adequate forum exists, we fashion this remedy. It will be available to teachers[10] until such time

[10]This remedy is limited to public school teachers because we deal here with a specific school teacher statute, sec. 118.22 (2).

and only until such time as the legislature provides a means to establish a forum that will meet the requirements of due process.

This procedure just announced requires that we reverse the trial court's summary judgment and that the matter be remanded to the trial court with the right of the parties to amend their pleadings so as to bring the necessary issues before the trial court.

The appellants also assert that the action of the board of education, wherein it decided to discharge the striking teachers, was in violation of the open meeting law.

This issue was raised in the appellants' third cause of action in the amended complaint filed in the trial court.

Paragraph 15 of the amended complaint provides:

> "On April 2, 1974, the Board, its administrators and agents, met and held a special meeting at which they considered, decided and acted to terminate the employments of the plaintiffs and other teachers similarly situated. No notice of said special meeting was ever given to the plaintiffs, or any other teachers similarly situated nor to the public."

The open meeting law, sec. 66.77, Stats., provided in part, prior to June 15, 1974:

> "(2) To implement and insure the public policy herein expressed, all meetings of all state and local governing and administrative bodies, boards, commissions, committees and agencies, including municipal and quasi-municipal corporations, unless otherwise expressly provided by law, shall be publicly held and open to all citizens at all times, except as hereinafter provided. No formal action of any kind, ex-

> cept as provided in sub. (3), shall be introduced, deliberated upon or adopted at any closed session or closed meeting of any such body, or at any reconvened open session during the same calendar day following a closed session. No adjournment of a public meeting into a closed session shall be made without public announcement of the general nature of the business to be considered at such closed session, and no other business shall be taken up at such closed session.
>
> "(3) Nothing herein contained shall prevent executive or closed sessions for the purposes of:
>
> "(a) Deliberating after judicial or quasi-judicial trial or hearing;
>
> "(b) Considering employment, dismissal, promotion, demotion, compensation, licensing or discipline of any public employe or person licensed by a state board or commission or the investigation of charges against such person, unless an open meeting is requested by the employe or person charged, investigated or otherwise under discussion."

The trial court sustained a demurrer to the third cause of action of the complaint, concluding that the meeting of the board fell within exceptions (3) (a) and (b) of the statute. With respect to (3) (b), the court noted that the complaint failed to allege that any employee had requested an open meeting.

The appellants' argument centers around the failure of the board to give any notice of the meeting. They contend that exception (3) (a) does not apply because deliberations after a "judicial or quasi-judicial trial or hearing" necessarily amounts to an "adjournment of a public meet-

ing into a closed session," and therefore requires a public announcement or notice. No authority is cited for that proposition and we believe the language of the statute permits no such interpretation.

With respect to sub. (3) (b), the appellants contend that they are foreclosed from requesting an open meeting because notice that the meeting was to be held was never given. First, it must be noted that the statute (prior to June 15, 1974) did not require that notice be given. More importantly, however, paragraph 5 of the amended complaint, which is specifically incorporated by reference into the third cause of action, clearly states that the board "notified the employees that the Board was considering taking action against their then current teaching contracts." In light of such allegation, which is borne out by other parts of the record, the appellants' contention that they had no opportunity to request an open meeting is without foundation. We conclude the demurrer to the third cause of action was properly sustained.

By the Court.—Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion. Order affirmed. No costs to be taxed.

NO. 635
August Term, 1974

STATE OF WISCONSIN: IN SUPREME COURT

HORTONVILLE EDUCATION ASSN. et al.,
Appellants,

v.

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1, et al.,
Respondents.

HANLEY, J. (Concurring in part; dissenting in part). I concur with the majority's conclusion that the demurrer to the third cause of action relating to the alleged violation of the open meeting law was properly sustained.

I respectfully dissent to the majority's ruling reversing the trial court's granting of summary judgment on the first cause of action.

Sec. 111.70 (4) (1), Stats., provides as follows:

> *"Strikes prohibited.* Nothing contained in this subchapter shall constitute a grant of the right to strike by any county or municipal employe and such strikes are hereby expressly prohibited."

The above provision means exactly what it states. Therefore, the action of the teachers, acting in concert, in refusing to report for work cannot be sanctioned as a strike either by this court, the school district, the teachers' union or the teachers. The action of the teachers constitutes a unilateral breach of employment.

On April 2, 1974 the board held a special meeting at which it adopted a resolution terminating the employment of the teachers who refused to report for work. Such action was an acceptance of the breach of contract by the teachers. With that acceptance, all employment relations between the board and the teachers terminated. Upon that termination any action on the part of the board relative to discharge was superfluous. There is no issue to be tried.

I would affirm the judgment.

I am authorized to state that Mr. Justice CONNOR HANSEN joins in this concurrence-dissent.

No. 635.
August Term, 1974.
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Respondents.

ROBERT W. HANSEN, J. *(concurring)*. School boards in this state are directed by statute to contract for the services of qualified teachers in their schools.[1] School teachers in this state are employees of such school boards

[1]Sec. 118.21 (1), Stats., providing: "The school board shall contract in writing with qualified teachers. . . ."

and stand "in a contract relation."[2] Except as otherwise provided by statute,[3] or constitutionally required,[4] the entire relationship between a school board and a school teacher derives from the contract between them.[5]

The school board in Hortonville had entered into such contractual relationship with each of its school teacher employees for the school year, 1973-74. Each such personal service contract fixed the salary, determined the services to be performed and set the term or period of employment. Each such contract incorporated into it "the last collective bargaining agreement," the 1972-73 master contract, between the Hortonville school board and the

[2]*State ex rel. O'Neil v. Blied* (1925), 188 Wis. 442, 446, 206 N.W. 213, holding: "One engaged in teaching in this state and whose services are to be paid for in whole or in part by the state school fund . . . stands in a contract relation. . . ."

[3]*See: Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B.* (1967), 35 Wis. 2d 540, 557, 151 N.W. 2d 617, holding sec. 111.70 (3) (a), Stats., to prohibit municipal employers, including school districts, from " '1. Interfering with, restraining or coercing any municipal employe in the exercise of the rights provided in sub. 2.

" '(2) Encouraging or discouraging membership in any labor organization, employe agency, committee, association or representation plan by discrimination in regard to hiring, tenure or other terms or conditions of employment.' "

See also: Sec. 119.42, Stats., establishing teacher tenure or permanent appointment after three years of continuous teaching service, but applying only to cities of the first class. As to status under tenure law, *see: State ex rel. Thompson v. School Directors* (1923), 179 Wis. 284, 288, 191 N.W. 746, citing *State ex rel Murphy v. Board of Trustees* (1918), 168 Wis. 238, 169 N.W. 567.

[4]*See: Alston v. School Board of City of Norwalk* (4th Cir. 1940), 112 Fed. 2d 992, holding that the right of a negro teacher to declaratory or injunctive relief against the practice of a school board in fixing salaries for negro teachers at a lower scale than for white teachers is not waived, or otherwise precluded, by the fact that the negro teacher has entered into a contract with the school board for the current vear to perform teaching services. (Certiorari denied in 311 U.S. 693, 61 Sup. Ct. 75, 85 L.Ed. 448.)

[5]*Board of Education of South Milwaukee v. State ex rel. Reed* (1898), 100 Wis. 455, 462, 76 N.W. 351, holding: ". . . . the relations and obligations between the relator . . . and the high school board of said district were purely and strictly of a contractual character. . . ."

Hortonville education association.[6] When the Hortonville teachers went on strike, they were teaching under contract, not after their contracts had expired.[7] When they failed to appear at the school to perform their duties under the contract, it became the duty of the school board to conduct an "inquiry into the question of the failure of a teacher to perform his contract obligation" and in case of such breach "to take such steps as may be necessary to carry out the purposes of the school."[8]

Facing such duty to ". . . take such steps as may be necessary" to reopen the school, the Hortonville school board acted. It did not go to court (as appellants now claim it should have) to seek an injunction, not only declaring the strike illegal[9] but also ordering the teachers back to the classroom *under the contract*. It could have chosen this route, but was not required so to elect. Neither did the school board prefer charges of misconduct against the

[6]"It is Further Agreed, that this contract incorporates herein by reference, to have the same effect as if made a part thereof of the last collective bargaining agreement entered into by and between the Hortonville Education Association, and said School Board, dated May 8, 1972, and is subject to all terms and conditions of such collective bargaining agreement. . . ." (Individual contract, March 12, 1973.)

[7]As to "minimal procedural safeguards" of sec. 118.22, Stats., applying to teachers not rehired, *see: Richards v. Board of Education* (1973), 58 Wis. 2d 444, 458, 206 N.W. 2d 597.

[8]*Curkeet v. Joint School District* (1914), 159 Wis. 149, 152, 149 N.W. 708, this court holding: ". . . School boards have thereby [sec. 441, Stats. 1913] enjoined upon them very extensive duties in maintaining the common schools and in administering the school affairs. Such duties embrace that of inquiry into the question of the failure of a teacher to perform his contract obligation as a teacher, and if they find that a teacher has breached his contract it is their duty to take such steps as may be necessary to carry out the purposes of the school, and if a teacher has failed to perform his duties under his contract they can discharge him from further service. . . ."

[9]*See:* Sec. 111.70 (4) (1), Stats. (upheld as constitutionally valid, applied to teachers, by majority opinion here), provides: "*Strikes prohibited.* Nothing contained in this subchapter shall constitute a grant of the right to strike by any county or municipal employe and such strikes are hereby expressly prohibited."

teachers, seeking their "discharge for cause" *under the contract*.[10] It could have taken this approach, but it is clear that it did not bring charges of misconduct *under the contract*. Instead, what the Hortonville school board did was to rescind or terminate the personal service contracts as to all teachers who elected to remain on strike (The dissenting-in-part opinion terms this ". . . an acceptance of the breach of contract by the teachers," which is another way of saying the same things.)

The communication sent each teacher by the board stated that the board had been informed by its superintendent of schools that, "You have breached your individual employment contract; You have engaged in an unlawful strike contrary to Wisconsin law."[11] The communication set a time and place for hearings as to whether the individual teacher had breached the employment contract, and noted that possible board action, if the facts established such breach, included ". . . termination of your employment contract."[12] A subsequent resolution. adopted by the school board, terminated the employment relationship as to teachers who had been thus notified or who had waived notice of their ". . . alleged breach of employment contract and participation in an unlawful strike."[13] To the

[10]*Scott v. Joint School District* (1881), 51 Wis. 554, 557, 8 N.W. 398, this court holding: ". . . We think the school board . . . have the power to close the school and discharge the teacher for just cause. . . ." As to scope of judicial review of such discharge for just cause, *see: Clark v. Blochowiak* (1942), 241 Wis. 236, 239, 5 N.W.2d 772, holding, where board of vocational education discharged for cause a supervisor of its dental clinic after a hearing, that, on certiorari to review the action taken by the board, ". . . the only matter the court could properly consider was whether on the evidence properly received by the board the charges against the plaintiff were sustained."

[11]Letter from Roger Weihing, President, for the Board of Education to individual teachers, March 29, 1974.

[12]*Id.*

[13]Resolution, Adopted by the Board of Education, April 2, 1974.

writer it appears clear that the school board, by thus terminating the employer and employee relationship on the ground of a major breach of such contract by the striking teachers, was rescinding the contracts of personal service as to all teachers who did not return to their teaching assignments.

A contract, including a personal service contract,[14] remains in force in accordance with its terms, unless one party to it ". . . acts inconsistently with the duty imposed upon him by the contract, which amounts to an abandonment. . . ."[15] However, it is not every breach of a contract consisting of failure to perform exactly that entitles the other party to rescission. Our court has held that, before a party not in default may be entitled to relief of rescission, there must be "so serious a breach of the contract by the other party as to destroy the essential objects of the contract."[16] Or, as another court has phrased it, the failure of performance, in order to constitute a ground for rescission, must be total, "such as to defeat the object of the contract or render it unattainable."[17] The claim of right to terminate and rescind its contracts with its teachers on ground of breach of contract was properly assert-

[14]68 Am. Jur. 2d, *Schools*, sec. 143, page 475, stating: "The principles governing contracts generally are applicable to contracts for the employment of teachers. Thus, such a contract is considered one for personal services and, where entered into for a definite term, is an entire contract for the period covered."

[15]17 Am. Jur. 2d, *Contracts*, sec. 482, page 951.

[16]*Hoffmann v. Danielson* (1947), 251 Wis. 34, 38, 27 N.W. 2d 759, this court holding: ". . . Before a party not in default may be entitled to the relief of rescission, there must be so serious a breach of the contract by the other party as to destroy the essential objcts of the contract. . . ."

[17]*Ellison, Son & Co. v. Flat Top Grocery Co.* (1911), 69 W. Va. 380, 387, 71 S.E. 391, stating the rule to be: " 'Generally the failure of performance, in order to constitute a ground for rescission, must be total; such as to defeat the object of the contract or render it unattainable. . . .' " Quoting 24 Am. & Eng. Ency. L 644.

able by the Hortonville school board. But the determination of whether the claimed breach of contract constituted ground for such rescission was here for a court to decide.

With the school board action found to be a rescission of contract, based on claim of teacher breach of contract, it follows that either party to the contract had right of recourse to the courts for a judicial determination of whether the breach warranted the rescission.[18] With the multiple cancellations of personal service contracts involved in an area of vital public concern, in the case before us the legal remedy is obviously inadequate, and the aid of a court of equity is required.[19] It follows that the school board here might have sought by application to a court of equity a judicial affirmation of its action in rescinding the employment contracts on ground of serious breach of contract by the teachers. Certainly the teachers, all or any one of them, are also entitled to challenge in a court of equity the action taken by the board. In either event, the issue for the court to determine is whether the breach of their contracts by the teachers under the circumstances,[20] was such as to warrant the school board's action in terminating their employment and rescinding their contracts. The test is the *Hoffman Case* test.[21] In the posture of this case, the

[18]17 Am. Jur. 2d, *Contracts*, sec. 503, page 979, stating: "Although contracts do not terminate as a matter of course on a breach, they may be terminable therefor. . . ."

[19]*See:* 17 Am. Jur. 2d, *Contracts*, sec. 485, page 955.

[20]17 Am. Jur. 2d, *Contracts*, sec. 501, page 977, stating: "No hard and fast rule exists as to the right of rescission for cause; the right usually depends on the circumstances of the particular case. . . ." *See also:* 17 Am. Jur. 2d, *Contracts*, sec. 503, page 980, stating: ". . . Moreover a party seeking to rescind must show that he was free from default in relation to the obligation which he claims the other party failed to perform. . . ." *See also:* As to violations of contract held not to justify rescission: *E. L. Husting Co. v. Coca Cola Co.* (1931), 205 Wis. 356, 237 N.W. 85, 238 N.W. 626.

[21]*Hoffman v. Danielson, supra*, footnote 16.

teachers have instituted equity proceedings, but not for the purpose above set forth. However, with an opportunity to amend such petition or pleadings granted, the proceedings instituted can be amended to present this issue and permit a judicial determination as to whether the teacher conduct, under the circumstances, justified the school board action.

Also on appeal to this court is the challenge to an order of the county court of Outagamie county, the Honorable R. Thomas Cane, presiding, which included orders that the school board submit a list of discharged teachers whom the board "would offer positions back" for the balance of the 1973-74 school year, that the board offer striking teachers positions for the balance of the 1973-74 school ". . . if and when vacancies arose," and that striking teachers offered a vacancy for the remainder of the 1973-74 school year accept such offer. The basic issue on appeal appears to be the jurisdiction of the county court, sitting in equity, to issue the order. The board initiated the proceedings involved, seeking a court order limiting picketing activity. Without comment on the issues raised on such appeal, pro or con, the writer considers it unfortunate that such appeal (No. 133, August Term, 1974) was not consolidated with the appeal here, so that all aspects of judicial proceedings involving the Hortonville teachers' strike could have, at one time and in one opinion, been considered and determined.

On this appeal, however, applying the law to the facts, the writer would: (1) Concur in the majority holding that the no strike by county or municipal employees' statute, sec. 111.70 (4) (1), Stats. is constitutionally valid; (2) concur in the majority holding that the open meeting law was not here violated; and (3) concur in the majority holding for reversal and remand but would limit the scope and purpose of such remand, with appellants here granted leave to amend their petition within thirty days, the petition to be amended to raise and present for judicial determination the issue of whether the acts of the teachers, under these circumstances, justified the school board in rescinding the employment contracts and terminating employment.

No. 635
August Term, 1974

STATE OF WISCONSIN: IN SUPREME COURT

HORTONVILLE EDUCATION ASSN., et al.,
Appellants,

v.

HORTONVILLE JOINT SCHOOL DISTRICT No. 1, et al.,
Respondents.

PER CURIAM (*on motions for rehearing*). The last sentence on page 482, continuing on page 483 of 66 Wis. 2d 469 is revised as follows:

> "Whether the master contract between the board and the Hortonville Education Association and the contracts between the individual school teachers and the board are comparable to contracts involved in other cases where striking teachers were disciplined or discharged cannot be determined from the record in this case."

Motions for rehearing are denied without costs.

APPENDIX II

DECISION ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT TO FIRST CAUSE OF ACTION

NATURE OF PROCEEDINGS:

The plaintiffs filed their original verified complaint alleging a single cause of action on April 5, 1974, to which the defendants responded by way of a verified answer filed April 24, 1974. Subsequently on May 31, 1974, the plaintiffs upon leave of this Court and pursuant to a verbal agreement of counsel for all parties filed a verified amended complaint alleging four separate causes of action. Prior to the expiration of forty days after joinder of issue by the defendants' answer to the original complaint, this Court by an order dated June 3, 1974, extended the time for moving for summary judgment pursuant to Secs. 269.45 and 270.-635, Stats., inasmuch as this Court construed *Snowberry v. Zellmer* (1964), 22 Wis.2nd 356; 126 N.W.2nd 26, to require a motion for summary judgment to be made within forty days of joinder of issue by the original pleadings. The defendants answered the first cause of action alleged in the amended complaint and moved thereafter for summary judgment as to the first cause of action within the enlarged time allotted by the Court.

DECISION:

The motion for summary judgment now before this Court pertains to a cause of action based on a theory of various due process violations arising out of a strike by the plaintiff teachers of the Hortonville Joint School District No. 1. The strike commenced March 18, 1974, and on April 2, 1974, the Hortonville Board of Education terminated the employment of the 88 members of the plaintiff class. Certain members of the plaintiff class have returned to work pursuant to an order of another Court, which order is now in the appeal process. However, those members of the plaintiff class who have returned to work have continued as members of the plaintiff class in the present action.

The plaintiffs in the present case are the Hortonville Education Association which, prior to March 18, 1974, represented all teachers under contract with the Hortonville Joint School No. 1, and six of the terminated teachers who are alleged to be "representative of all teachers employed by the District whose employments the Board has acted to terminate." The requisite allegations are set forth in the plaintiffs' amended complaint so as to enable this Court to deem the present matter a class action as provided for in Sec. 60.12 Stats.

One of the defendants is the Hortonville Joint School District No. 1 which had prior to April 2, 1974, employed the plaintiff class; the remaining defendants are members and officers of the Hortonville Board of Education in their official and individual capacities as well as three administrators of the Hortonville Joint School District No. 1 in their official and individual capacities.

Termination of employment by the Hortonville Board of Education was applicable to the 1973-74 school year contracts with the individual members of the plaintiff class and the 1974-75 school year contracts which had been tendered by the Hortonville Board of Education to the individual members of the plaintiff class. There exists no master contract between the Hortonville Education Association and the Hortonville Joint School District No. 1 for either the 1973-74 and 1974-75 school years.

In order to determine if the defendants have set forth such facts as shall show their denials or defenses to be sufficient to defeat the plaintiffs' first cause of action under the statutory criteria of Sec. 270.635, Stats. it appears appropriate in this instance to first consider the plaintiffs' theory of various procedural due process violations as set forth in the plaintiffs' amended complaint. This Court, as did the Court in *American Mutual Liability Insurance Company v. St. Paul Fire and Marine Insurance Company,* (1970), 48 Wis. 2nd 305; 179 N.W. 2nd 864, finds it necessary to review in part the amended complaint in order to determine whether the defendants' affidavit in support of their motion for summary judgment contains the required evidentiary facts so as to entitle the defendants to summary judgment. However, the amended complaint as well as the defendants' answer, as pleadings, are not effectual as factual proof and cannot perform the requisite function of affidavits. *Leszczynski v. Surges* (1966), 30 Wis. 2nd 534; 141 N.W.2d 261. Only two affidavits were filed herein. Mr. Roger Weihing, a member and president of the Board of Education of the Hortonville School District No. 1, filed an affidavit in support of the defendants' motion for summary judgment. Mr. Michael Wisnoski, a member of the plaintiff class and president of the Hortonville Education Association, filed an affidavit on behalf of the plaintiffs in opposition to the motion for summary judgment.

Paragraph 5 of the amended complaint is the first material paragraph containing allegations relating to procedural due process. That paragraph, in its entirety, alleges:

> "5. Immediately prior to, during and immediately following the weekend of March 30 and 31, 1975, the individually-named plaintiffs, and all other teachers represented by the Association, were served notices that the Board had scheduled hearings for each and every one of them, at twenty-minute intervals, commencing Monday Morning, April 1, 1974, through and until late on Wednesday evening, April 3, 1974. These notices notified the employees that the Board was considering taking action against their then current teaching contracts. Said notices failed to afford the plaintiffs, and others who received similar notices, a fair or adequate opportunity to consult with an attorney or to prepare for a hearing or to defend against the reasons that the Board might consider for the termination of their employment."

The affidavit of Roger Weihing, submitted on behalf of the defendants states in paragraphs 8 and 9 essentially that during a special School Board meeting held on March 29, 1974, it was decided to schedule disciplinary hearings for each individual member of the plaintiff class then engaged in a work stoppage and that a notice of the disciplinary hearings were delivered to the Outagamie County Sheriff's Department on March 29, 1974, for service on each individual teacher. Exhibit "B" attached to Mr. Weihing's affidavit is a copy of the notice of the individual disciplinary hearings. Also attached to that same affidavit and identified as exhibit "C" is a compilation of the dates the disciplinary hearing notices were served on the individual members of the plaintiff class and the date and times of the scheduled disciplinary hearings. It appears from exhibit "C" that all the teachers subject to a disciplinary hearing here served notice of such hearing on or before April 2, 1974, with the exception of Mrs. Nancy Miller. In all, eleven teachers were served notices, including the day of service, four days before their scheduled hear-

ing, fifty-one teachers three days prior to their scheduled hearing, twenty-two teachers two days prior to their scheduled hearing, three teachers one day prior to their scheduled hearing and one teacher received her notice the day of her scheduled hearing. It should be noted that the first notices were served on March 29, 1974, which was a Friday (twenty-three in number) with the balance being served on the next day, a Saturday (forty-four in number) and both Monday (twenty in number) and Tuesday (one in number) of the following week. As to the actual contents of the notice of disciplinary hearings, the dates the notices were served and the dates of the scheduled disciplinary hearings no factual controversy exists

However, with respect to the aforesaid notices and their service on the teachers it is the plaintiffs' conclusion as stated in the amended complaint that such notice did not give them adequate opportunity to:

a) consult an attorney

b) prepare for their scheduled hearings

c) defend against reasons the School Board might consider for termination of employment.

By means of Mr. Weihing's affidavit, in particular paragraphs 9 and 10 thereof the defendants have set forth facts relating to the conduct and statements of plaintiffs' counsel at the April 1, 1974, hearing before the Hortonville Board of Education. That meeting was attended by all members of the plaintiff class in mass rather than individually as scheduled with the exception of five teachers who remain members of the plaintiff class. Among those facts are the plaintiffs' appearance before the Hortonville Board of Education with an attorney, the objection of the plaintiffs'

attorney to the insufficiency of the notice without a specified request as to the additional length of time needed for preparation or a request for an adjournment and the participation of plaintiffs' counsel in the proceedings. On the basis of those primary facts the defendants urge that it can reasonably be inferred that the notice in question was timely and adequate and, if not, any objection thereto was waived by failure to specifically request an adjournment of a specified length.

With respect to the adequacy and timeliness of the notice of the disciplinary hearings this Court deems there to be no controverted facts. Only the inferences to be drawn from those facts upon which legal conclusions can be based are in dispute. This is not to say, however, that such inferences are reasonable.

Paragraph 6 of the plaintiffs' amended complaint relates to the actual procedure utilized at the April 1, 1974, appearance of all but five members of the plaintiff class before the Hortonville Board of Education. In its entirety paragraph 6 recites:

> "6. On Monday, April 1, 1974, the plaintiffs and other similarly situated teachers appeared before the Board and objected to the lack of fair and adequate notice of and opportunity to prepare for the scheduled hearings, and objected to the Board acting as the decision-maker in their cases, because of its involvement in the very circumstances which gave rise to the Board's consideration of the termination of their employments. Plaintiffs and other teachers requested the opportunity to present evidence in their defense, in mitigation of reasons the Board might consider grounds for the termination of their employments. At the beginning of said appearance before the Board,

the plaintiffs and the other teachers further requested the opportunity to examine adversary management personnel relative to the charges against them. All of the objections and requests made by the plaintiffs and by other teachers were denied by the Board, which acted on the advice of its attorney. The Board's attorney acted both as counsel to the Board and as prosecutor, presenting the charges and evidence against the plaintiffs. No evidence was adduced at the hearings against any of the plaintiffs or other teachers who appeared before the Board."

Scrutinizing Mr. Weihing's affidavit submitted on behalf of the defendants with respect to that portion pertaining to the April 1, 1974, proceedings before the Board of Education, there are the following pertinent facts:

a) counsel for the plaintiffs did object to the sufficiency and adequacy of the disciplinary hearing notices

b) counsel for the plaintiffs was denied the opportunity to question various Hortonville Board of Education members adversely

c) counsel for the plaintiffs did make an offer of proof

d) counsel for the plaintiffs instructed the members of the plaintiff class not to answer questions addressed to them individually and the plaintiff class did not individually respond to any questions by the Board of Education

e) counsel for the plaintiff advised the Board of Education that all members of the plaintiff class were

relying on the Hortonville Education Association to respond on their behalf and that individual hearings were not necessary.

The evidentiary facts contained in the plaintiffs' affidavit in opposition to the motion for summary judgment do not controvert the facts related above as they appear in the defendants' supporting affidavit. The plaintiffs' affidavit does, however, add the additional facts that counsel for the plaintiffs objected to the Hortonville Board of Education acting as decision-maker and its counsel acting in a dual capacity as adviser and prosecutor. Neither the affidavit submitted by the defendants or the plaintiffs actually state whether evidence was received at the April 1, 1974, hearing beyond the offer of proof made by plaintiffs' counsel.

It should be noted that paragraph 10 of the affidavit of Michael Wisnoski submitted on behalf of the plaintiffs stated that the Board of Education refused to permit evidence to be presented on behalf of Mr. Wisnoski by way of a defense and in mitigation of any conduct on his part. As to whether that statement refers to evidence in addition to the offer of proof made by plaintiffs' counsel and the request to adversely examine various Board of Education members is unclear unless read in conjunction with paragraph 11 of that same affidavit. Paragraph 11 states that Mr. Wisnoski authorized the Hortonville Education Association to respond on his behalf and he personally chose to follow his counsel's advice not to respond individually. The only reasonable inference from the apparently contradictory statements of fact is that paragraph 10 of Mr. Wisnoski's affidavit in conjunction with the remainder of his affidavit, and in particular paragraph 11, refers to the

offer of proof and the attempt to adversely examine the Board of Education members on behalf of all teachers reprsented by the Hortonville Education Association, not any additional attempt to present evidence on behalf of Mr. Wisnoski individually. Also, it should be noted that Mr. Wisnoski's individual disciplinary hearing had been scheduled as shown by exhibit "C" not for April 1st but for 9:20 a.m. on April 2, 1974.

The material facts as to the procedure of what the plaintiff class turned into a mass disciplinary hearing on April 1, 1974, are not controverted. It is only the inferences to be drawn from those facts and various statements made by counsel for both the plaintiff and the defendants that are disputed.

Considering next paragraph 7 of the plaintiffs' amended complaint it is alleged:

> "7. By letters dated April 2, 1974, the plaintiffs' and, on information and belief, almost all other teachers employed by the District, were notified by the Board that the Board had acted to terminate their employment, both under the current teaching contracts, and under the teaching contracts they had signed for the 1974-75 school year. By the same letters, the plaintiffs and other teachers were invited individually to reapply for employment with the District. At no time have the plaintiffs, or any other teachers similarly situated, ever been informed of the evidentiary basis for the Board's decision to terminate their employment both this year and for the 1974-75 school year."

A copy of the termination notice was not attached to the affidavit submitted on behalf of the defendants in support of their motion for summary judgment. However, paragraph 16 of the defendant affidavit specifically refers to and identifies the termination notice in question and thereby incorporated by reference exhibit 2 introduced at a prior evidentiary hearing conducted by this Court. The notice of termination provided in pertinent part:

> "The Board found you guilty of the conduct set forth in Mr. Weihing's notice of March 29, 1974. Specifically it is found that since March 18, 1974;
>
> You breached your individual employment contract: You engaged in strike activity contrary to Wisconsin law.
>
> The Board further found that these breaches of duty in law constitute good and sufficient cause for the immediate termination of your teaching contract.
>
> Therefore, you are advised that your employment with the Hortonville Community Schools, Joint School District No. 1, Village of Hortonville, *et al.*, is hereby terminated, effective immediately. Furthermore, this action includes the withdrawal of the offer of employment for the 1974-75 school term, and/or termination of such tendered employment contract."

The defendants' affidavit further states that the aforementioned notice of termination was sent by certified mail to each terminated member of the plaintiff class. Nothing in the affidavit of Mr. W[illegible]ski submitted on behalf of the plaintiffs controverts the contents or mailing of the notice of termination. According to the plaintiffs' affidavit, on April 3, 1974, he received a copy of the Board of Education's resolution to terminate the plaintiff class. Additionally, Mr. Wisnoski states in his affidavit in paragraph 15 that he has personally never been informed of the evidentiary basis for the Board of Education's conclusion that he has breached

his contract or engaged in an unlawful strike, nor that he was ever informed of the evidentiary basis for the decision to terminate his employment for the 1973-74 and 1974-75 school years.

Once again it is apparent that as to the pertinent material facts relating to alleged due process violations as set forth in paragraph 7 of the plaintiffs' amended complaint there is no dispute other than as to the inferences to be drawn from the facts.

Reviewing next paragraph 8 of the plaintiffs' amended complaint it is alleged therein:

> "8. The Association, which represents the plaintiffs and all other teachers employed by the district, was not informed of the hearings scheduled by and before the Board for April 1, 2, and 3, 1974. The Association also was not given any advance notification of the Board's decision to terminate the employment of the plaintiffs and other teachers represented by the Association."

There is no reference contained in the defendants' affidavit that Mr. Weihing addressed a notice to the Hortonville Education Association itself with respect to the scheduled disciplinary hearing of April 1, 2 and 3, 1974, and the decision to terminate the employment of the plaintiff class. In paragraph 7 of the plaintiffs' opposing affidavit it is stated that no advance notice was given to the Hortonville Education Association as an organization with respect to the disciplinary hearings. In paragraph 13 of the plaintiffs' affidavit it is further stated that notice of the Board of Education decision to terminate the members of the plaintiff class was received *post facto*.

Concerning the question of advance notice to the Hortonville Education Association there appears in the affidavits no controverted facts as to the lack of advance notice of the disciplinary hearings and the decision to terminate the employment of the plaintiff class.

Summarizing the plaintiffs' allegation of specific procedural due process violations they are in substance in brief:

a) Timeliness and adequacy of the disciplinary notices.

b) Board of Education sitting as decision-maker at the disciplinary hearing.

c) Prohibition of adverse examination of various Board of Education members at a disciplinary hearing.

d) Counsel for the Board of Education simultaneously acting as adviser and prosecutor.

e) No evidence against the plaintiff adduced at the disciplinary hearing.

f) Lack of notice of evidentiary basis for concluding there was a breach of contract and an unlawful strike nor notice of evidentiary basis for termination of employment of the plaintiff class.

g) Lack of advance notice to the Hortonville Education Association concerning the disciplinary hearings and the terminatin of employment of the plaintiff class.

On the basis of the foregoing alleged violations of procedural due process the plaintiffs formulate their theory of the first cause of action in their amended complaint. The plaintiffs allege that all of the aforesaid due process violations

were done under color of State law, intentionally, maliciously, capriciously and arbitrarily, and in bad faith and as part of a conspiracy to deny the members of the plaintiff class their procedural due process rights under the 14th Amendment to the United States Constitution and Article 1 of the Wisconsin Constitution. As a result, the plaintiffs allege, *inter alia*, that they have effectively been denied their property interest in continued employment with the Hortonville Joint School District No. 1 as well as their liberty in securing employment in the teaching profession. Such deprivation of procedural due process the plaintiffs further allege has resulted in irreparable damage to their persons, reputations and financial interests.

As stated by the Court in *American Mutual liability Insurance Company v. the St. Paul Fire and Marine Insurance Company, supra,* at page 312, a motion for summary judgment, when invoked by a defendant, is used on the assumption that even though a complaint states a cause of action the cause is factually unsupportable. Inasmuch as the Court had deemed there to be no dispute as to the material facts involved in this case, if the defendants' affidavit in support of the motion for summary judgment contained no additional facts this Court could deem the defendants to have attempted to use a motion for summary judgment as a substitute for a demurrer.

However, there remains one fact in the defendants' affidavit by Mr. Weihing which is uncontroverted by the plaintiffs' affidavit in opposition to the motion for summary judgment. That fact is set forth in paragraph 2 of Mr. Weihing's affidavit which reads;

> "That commencing Monday, March 18, 1974, the teaching employees then employed by said school district engaged in an unlawful strike against the defendant school district; . . ."

Reference to the strike being unlawful is, of course, a conclusion and not a fact and as such, is inappropriate in an affidavit requiring evidentiary facts. Sec. 270.635, Stats. continuing through the remainder of Mr. Weihing's affidavit it is clearly stated that the strike by the members of the plaintiff class continued up to and through April 2, 1974, the date of the employment discharges. Thus, it is uncontroverted that the underlying fact that a strike existed commencing March 18, 1974, establishes the framework within which this Court can consider the concept of due process. For as the Court stated in *Goldberg v. Kelly,* 397 U.S. 254, 263, 90 S. Ct. 1011, 1018, 25 L. Ed. 2nd 287 (1970), in quoting an earlier case:

> " . . . consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been affected by governmental action."

EMPLOYER-EMPLOYEE RELATIONSHIP SUBSEQUENT TO MARCH 18, 1974

The individual members of the plaintiff class were prior to March 18, 1974, municipal employees as defined in Sec. 11.70(1) (b), Stats., and the Hortonville Joint School District No. 1 was at all times pertinent herein a municipal employer as defined in Sec. 11.70(1)(a), Stats. Thus at all times relevant the members of the plaintiff class were prohibited from engaging in a strike by virtue of Sec. 11.70 (4) (1) which provides:

> "Nothing contained in this subschapter shall constitute a grant of the right to strike by any county or municipal employee and such strikes are hereby expressly prohibited."

It is urged by the defendants that this Court equate the terms "strike" and "quit" thereby alleviating any constitutional duty on their part to grant the plaintiff class due process. This State has not adopted that position with respect to strikes in the public employment sector nor have the defendants cited authority from other jurisdiction on that point. In the private employment sector the Wisconsin rule is that a strike is a cessation of work on the part of strikers and does not in and of itself constitute a termination of the employer-employee relationship; it is a subsequent discharge which severs the employer-employee relationship. *Marathon Electric Manufacturing Corporation v. Industrial Commission* (1955) 269 Wis. 394; 69 N.W. 2nd 573. *Fredericks v. Industrial Commission* (1958) 4 Wis.2nd 519, 91 N.W.2d 93. In fact, it is a frequent practice in this State for a municipal employer to obtain a court injunction when confronted with a strike. Such a procedure is based on the existence of an employer-employee relationship. While no longer valid law, Sec. 111.70(7), Stats., (void since September 1, 1973) referred to "employe" and "employer" is a public employment strike situation wherein the legislature prescribed the penalty for continuing to engage in a strike after a court injunction was issued. In their brief the defendants have made reference to obtaining a Court order enjoining the strike as one of the options available to them which they need not have nor did they exercise. This Court can see a grave consequence to the general public by equating the terms "strike" and "quit"

when one considers police, fire and sanitation personnel striking in metropolitan areas. Operations would not only be at a standstill but would be hampered long after commencement of a strike. I find no basis in law nor in public policy that compels construing a prohibited public employment strike as in and of itself terminating the municipal employer-employee relationship.

DUE PROCESS CONCEPT OF PROPERTY AND LIABILITY

As employees of the Hortonville Joint School District No. 1 it must be next determined if the members of the plaintiff class were entitled to a due process hearing. The State action involved is, of course, the discharge by the school district which is created and controlled by State law and State agencies. The property interest of the plaintiffs does not arrive by means of statutory provision because Chapter 118 of the Wisconsin Statutes does not provide for tenure for teachers employed in a school operating and lying in a county having a population less than 500,000. Section 118.21, Stats., does, however, require individual contracts to be executed between individual teachers and school boards. In addition, Sec. 118.22, Stats., establishes the mechanism for renewal or refusal to renew such individual contracts, but no procedure for discharge is established by statute. Sec. 118.22, Stats., further requires that notice of renewal or refusal to renew individual contracts must be given on or before March 15 of each year. Although the plaintiff class was engaged in a prohibited strike when discharged, the members of the plaintiff class retained an interest in continued employment. *Perry v. Sinderman*, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 570 (1972) and *Board of Regents of State College v. Roth*, 408 U.S. 564,

92 S. Ct. 2701, 33 L. Ed. 548 (1972) involved nonrenewal of untenured teachers who had one year contracts. Although the Court in *Roth, supra,* held the teacher not to be entitled to due process because he had no interest or entitlement to future employment, the Court stated:

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to indicate those claims.
>
> "Property interests, of course, are not created by the constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." (408 U.S. 577, 92 S. Ct. 2709)

In *Perry, supra,* the Court did find a denial of due process stating:

> "A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing." (408 U.S. 601, 92 S. Ct. 2699)

A summary dismissal of an untenured teacher not under formal contract without a hearing or inquiry was contrary

to due process on the basis of an implied promise of continued employment. *Connell v. Higgenbotham* (1971) 403 U.S. 207, 91 S. Ct. 1772, 29 L. Ed. 418.

Certainly the plaintiff teachers relied on their employment with the defendant Hortonville Joint School District No. 1. Prior to discharge the plaintiff teachers were entitled to their jobs for the remainder of the 1973-74 school year with the valid expectation of continued employment for the 1974-75 school year. Such objective expectation of continued employment could in part be founded in the statutory dictates of Secs. 118.21 and 118.22 Stats., with respect to the mandatory existence of individual teacher contracts and non-renewal procedures for those contracts. In addition to their existing individual contracts for the school year 1973-74, the plaintiff teachers had been tendered contracts for the 1974-75 school year. Thus this Court deems the members of the plaintiff class to have the requisite property interest, that is, expectation of continued employment with the defendant Hortonville Joint School District No. 1 so as to entitle them to a due process hearing.

The Court in *Roth, supra,* also addressed itself to the issue of deprivation of liberty of a result of a stigma attached stemming from charges against an individual wherein it is stated:

> "[W]here a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." ((citations omitted; 408 US. 573, 92 S. Ct. 2707)

In the instant case the charges asserted against the plaintiff teachers were that they had breached their individual

contracts and engaged in an unlawful strike contrary to Wisconsin law. While those charges do not bear the same stigma as would charges of immorality or dishonesty, they do constitute charges that in all likelihood would diminish the plaintiff teachers' prospective employment opportunities. Thus this Court also deems there to be a significant potential deprivation of liberty because of the nature of the charge so as to entitle the plaintiff class to a due process hearing.

DUE PROCESS PROCEDURES

Having been entitled to a due process hearing and having been granted a hearing it must next be determined if the hearing granted the plaintiff teachers was constitutionally anticeptic within the framework of due process. This Court has previously found no controverted facts to exist as to the hearing procedures utilized by the defendants. The concept of due process is not static nor are its ramifications identical in every situation. The Court in *Arnett v. Kennedy*——U.S.——,94 S. Ct. 1633, 1645,——L. Ed. 2nd ——(197—) notes:

> "The types of 'liberty' and 'property' protected by the Due Process Clause vary widely, and what may be required under the clause in dealing with one set of interests which it protects may not be required in dealing with another set of interests.
>
> > 'The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.' " (citation omitted)

Thus the principals of due process in the instant case must be tempered by the underlying facts as presented in

the affidavits filed in support of and in opposition to the motion for summary judgment. The factual setting involves a strike by the members of the plaintiff class who constituted all but a few teachers then under contract with the Hortonville Joint School District No. 1. The effect of the strike which commenced March 18, 1974, was to completely bring the operations of the school in that district to an immediate and complete halt. By means of substitute teachers the schools resumed operations sporadically after March 25, 1974, until April 2, 1974, when the Board of Education voted to terminate the employment of the plaintiff class. After April 8, 1974, the schools were again opened permanently with the employment of "replacement" teachers. It is within the framework of the foregoing facts that this Court must determine, if it can do so as a matter of law, whether the plaintiff class was accorded due process.

It is undisputed that a letter dated March 23, 1974, was sent to each member of the plaintiff class by the superintendent of the Hortonville Joint School District No. 1 advising that the strike was contrary to Sec. 111.70, Stats., and further that: "The School Board can not and will not condone unlawful activity under this statute. " The letter, a copy of which has been identified as exhibit "A" and attached to the defendants' affidavit herein concluded by stating: "We regret having to issue this letter, but wanted to make certain that all teachers of the Hortonville School District are fully informed that under State law, teachers' strikes are expressly prohibited."

Next, the record pertinent to the motion for summary judment states that the members of the plaintiff class were served a notice of disciplinary hearing between March 29 and April 1974. Exhibit "B" attached to the defendants'

affidavit in support of the motion for summary judgment accomplished the following purposes:

a) disclosed the precise charge made against the individual teacher—since March 18, 1974, the existence of a breach of the individual employment contract and engagement in an unlawful strike contrary to Wisconsin law

b) identified who made the charge—Superintendent Obry

c) advised of possible disciplinary action—termination of employment contract

d) established specified date, time and place of hearing

e) informed individual teachers of opportunity to present any statement or evidence relevant to the alleged conduct.

The teachers named as plaintiffs in this case and who allege themselves to be representative of the entire class of teachers were served notice not less than two days nor more than three days prior to their scheduled hearing time. Hence the crucial issue with respect to notice is whether such notice under the conditions related above were adequate and timely. In *Goldberg, supra,* the Court held a due process hearing essentially in terminating welfare benefits and stated therein:

> "The fundamental requisite of due process of law is the opportunity to be heard. (citations omitted) The hearing must be at a meaningful time and in a meaningful manner. (citation omitted) In the present context the principals require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally. (397 U.S. 267, 268, 90 S. Ct. 1020)

Considering the due process requirements in the case of teacher dismissed during the school year upon a two day notice of hearing and after an oral statement of reasons for a suspension commencing four days prior to the notice of hearing, the Court in *Ahern v. Board of Education of School District of Grand Island,* 456 F. 2nd 399, 403 (8th Cir. 1972) stated:

> ". . . she might have been notified with greater precision of the basis for her suspension and dismissal, and the time between the notice and the hearing might have been greater, and the school board might have detailed its decision in a formal writing, none of these ideal conditions are prerequisties to a finding that a hearing has been granted which comports with accepted notions of procedural due process. A fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." (citation omitted)

Applying the foregoing due process standard as set forth in *Goldberg, supra,* and *Arnett, supra,* which were drawn from earlier U.S. Supreme Court decisions cited in *Ahern, supra,* to the case at bar the undisputed facts show an adequate and timely notice to have been given to the plaintiff class under the then existing condition of forced school closings as a result of the prohibited strike. The

notice provided by exhibit "B" attached to the defendants' affidavit herein unequivocally stated the precise nature of the charge, its source, the possible consequences as well as the time and manner in which the members of the plaintiff class could refute the charge. Counsel for both parties cited numerous cases involving various fact situation in which notice of a specific duration was deemed constitutionally appropriate. Those cases, however, deal with areas of law most dissimilar to the area of employer-employee relationship in a prohibited strike setting such as the present case. What this Court deems to be adequate and timely notice as a matter of law in the present case is done in the context of the nature of the charge. The plaintiff class either was on strike in violation of Sec. 111.70(4)(1), Stats., or it was not on strike. If the fact was that a strike was in existence as set forth in the defendants' affidavit herein, then there could be no defense to the charge for Sec. 111.-70(4)(1) expressly prohibits strikes in the public employment sector. As this Court has previously held in a ruling on a request by the plaintiffs for temporary injunctive relief, Wisconsin does not recognize that strikes in the public employment sector are permissible where justified or provoked. If the State law prohibiting public employment strikes was not so express or provided exceptions to the strike prohibition this Court could not readily deem the notice of disciplinary hearing to be timely and adequate as a matter of law. Had the plaintiff class been charged additionally with an indefinite allegation such as misconduct or inefficiency, then the notice in question might very well not be adequate or timely within the concept of due process. Inasmuch as there can be no legal defense to the charge of striking in violation of Sec. 111.70(4)(1) of the Wisconsin Statutes this Court cannot foresee the need

of a notice of longer duration in order to defend against such charge. Simply, the plaintiff class either was or was not on strike.

As noted earlier in this decision there is no controversy in the fact that the Hortonville Board of Education sat as the decision maker, that the plaintiffs were prohibited from adversely examining various members of the Board of Education and that counsel for the Board of Education acted in the dual capacity of adviser and prosecutor. As a matter of law these factors do not constitute a deprivation of due process.

Numerous U.S. Supreme Court decisions do require the decision-maker in a due process setting to be impartial. But again due process must be viewed within the framework of the setting of the present case. Sec. 118.22, Stats., provides in pertinent part:

> "No teacher may be employed or dismissed except by a majority vote by a full membership of the board."

Thus no one but the Board of Education could by State law make the decision which ultimately was made to discharge the teachers. Then too, the charge of striking in violation of State Statute was the sole charge before the Board of Education; this is not a situation similiar to charges of misconduct of inefficiency where it would be necessary for the decision-maker to judge the credibility of witnesses and weigh the evidence. The uncontroverted fact in the situation is that a strike existed and therefore the degree of impartiality which may have been required in other settings was not necessary to adjudicate the single fact involved in this case. In that connection it must be noted further that the plaintiff class has not claimed to

have been discharged for any constitutionally impermissible reason.

With respect to the denial of the opportunity to adversely examine various members of the Hortonville Board of Education it must first be pointed out that it was Superintendent Marvin Obry and not any member of the Board of Education who charged the plaintiffs with striking. In a due process setting it is necessary that there be afforded an opportunity to confront and cross-examine adverse witnesses. *Goldberg, supra; Greene v. McElroy,* 360 U.S. 474, 79 S. Ct. 1400. 3 L. Ed. 2nd 1377 (1959). The members of the Hortonville Board of Education on the uncontroverted facts were not adverse witnesses. The purpose of the plaintiffs' attempt to adversely examine the board members was stated at the April 1, 1974, hearing which was reported and the transcript thereof incorporated in the defense affidavit in support of the motion for summary judgment. Plaintiffs' counsel at that hearing was asked to indicate the nature of the evidence he wished to present and he responded in this fashion:

> "Yes, it goes to bargaining here, and I have some questions of some of the Board members." (p.28 of transcript)

Thereafter plaintiffs' counsel made an offer of proof confined solely to the bargaining issues. Clearly, the purpose of adversely examining the board members was not directed to the charge of striking but to facts involving negotiations on a variety of issues in the labor dispute; the purpose was to justify the strike which this Court has deemed legally impossible. The denial of adverse examination of various board members in this context was proper.

Considering the dual capacity of the Board of Education's counsel as adviser and prosecutor this Court finds no such constitutional prohibition. The citations presented to this Court by the plaintiffs deal with economic or personal confliciting interests of the decision maker. In this situation the capacities of adviser and prosecutor are not constitutionally incompatible.

Also uncontroverted are the contents of the transcript of the April 1, 1974, hearing and the termination notice both of which were incorporated by reference in the defendants' affidavit in support of the motion for summary judgment. The transcript of the April 1, 1974, hearing contains the following statement of plaintiffs' counsel:

> "We have already indicated, everybody got the same form, and they are all charged with the same thing. They have consulted and conferred amoung themselves and concurred that *they have done or not done the same things, all of which would be within the knowledge of the management. . . .*" (P. 22 of transcript, emphasis added)

The plaintiff class whose members had individual hearings scheduled for the morning of April 1, 1974, had their hearings called. Their attorney who was present advised the Board of Education that no individual member of the plaintiff class would answer any question or participate on an individual basis. Thereafter all members of the plaintiff class then represented by counsel on an individual basis, eighty-two in number, advised the Board through counsel that they desired one mass hearing instead of individual hearings as had been scheduled; further they advised through counsel that they would not respond to any questions put to them by the Board on an individual basis. The

same procedure was followed on a subsequent date for members of the plaintiff class not represented by counsel on April 1, 1974.

In a statement to the Board at the April 1, 1974, hearing plaintiffs' counsel advised that the eighty-two individuals he then represented discussed the only inference the Board stated it would draw from the plaintiffs' refusal to answer questions individually, namely, that the plaintiffs were "engaged in a work stoppage." (P. 24 of transcript) Plaintiffs' counsel only objected to any legal conclusions being drawn from such factual inference. Whereupon the Board of Education rested and the plaintiffs as a body attempted to adversely examine some members of the Board and made an offer of proof as was discussed above in connection with collective bargaining issues.

Also discussed earlier in this decision was the contents of the notice of termination dated April 2, 1974. The notice of termination in brief, informed the plaintiff class that they had been found guilty of the conduct charged in the notice of hearing dated March 29, 1974, namely, having since March 18, 1974, breached their individual employment contracts and engaging in strike activity contrary to Wisconsin law.

The purpose of disclosing the evidentiary basis in a due process setting was stated in *Green v. McElroy, supra:*

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the government's case must be disclosed to the individual *so*

> *that he has an opportunity to show that it is untrue.* (emphasis added) (360 U.S. 496, 79 S. Ct. 1413)

In the instant situation the plaintiff class knew the Board of Education had before it the information of Superintendent Obry that the teachers were on strike as noted in the notice for disciplinary hearings dated March 29, 1974. Also the plaintiff class knew, by means of a letter sent to them under the date of March 23, 1974, a copy of which was marked exhibit "A" and is attached to the defendants' affidavit in support of the motion for summary judgment, that the Board of Education had personal knowledge of the existing strike. As stated by plaintiffs' counsel at the April 1, 1974, hearing referring to the plaintiff class:

> ". . . they have done or not done the same things, all of which would be within the knowledge of the management. . . ." (P. 22 of transcript)

Thus in the present setting it would be superfluous for anyone to state on the record that the plaintiff class was engaged in a strike. The plaintiff class was warned that their refusal to answer questions would result in an inference that they were "engaged in a work stoppage" in violation of their individual employment contracts and in violation of State law. Subsequently, the April 2, 1974, termination notice advised the plaintiff class that the members were found guilty of the conduct alleged in the notice of disciplinary hearing, that is, striking in violation of their individual employment contracts and State law. The applicable constitutional test is not what was the evidence adduced at the hearing or detailed in the termination notice, but rather was the basis of the Board of Education's case sufficiently disclosed so that the plaintiff class could show the evidence to be untrue.

The plaintiff class was sufficiently informed of the charges and their source so as to have a meaningful opportunity to defend themselves and decide if they had been discharged for constitutionally impermissible reasons. There are no other reasonable inferences or conclusions to be drawn from the uncontroverted facts. Therefore this Court finds the evidence considered by the Board as disclosed to the plaintiffs was sufficient to accord them due process as a matter of law in this particular setting.

With respect to lack of prior notice to the Hortonville Education Association in any of the procedures utilized by the Board of Education this Court finds no duty to afford the Hortonville Education Association with due process inasmuch as the contracts involved were those of individual teachers who were individually given notice and individually provided an opportunity for an individual hearing on their individual participation in the strike. As a practical matter, the Hortonville Education Association membership constituted the plaintiff class and the Association did appear at the April 1, 1974, disciplinary hearings. The interests of property and liberty involved here were those of the individual teachers, not the Hortonville Education Association. If the Hortonville Education Association was entitled to due process for considerations other than due process, remedies in another forum are available.

Perhaps the most volitable issue in this entire factual setting is the allegation that the defendants conspired to deny the plaintiff class of due process. However, this Court having found no due process violations to exist within the context of this motion for summary judgment, the Court deems it unnecessary to discuss this issue further.

SUMMARY

Upon consideration of the defendants' affidavit in support of the motion for summary judgment together with the attached and incorporated documents this Court deems the defendants to have made a prima facie case.

After consideration of the plaintiffs' affidavit in opposition to the motion for summary judgment the Court deems that no material controverted facts exist.

There being no evidentiary facts in the affidavits from which reasonable but different inferences could be drawn, this Court can only conclude that although the plaintiffs have stated a cause of action such cause of action is factually unsupportable.

In addition, this Court finds as a matter of law:

1. The strike which commenced March 18, 1974, did not *per se* sever the relationship of employer-employee between the plaintiff teachers the defendant Hortonville Joint School No. 1;

2. The plaintiff teachers in spite of a strike in violation of Sec. 111.70(4) (1), Stats., were entitled to due process procedures to protect their property and liberty interest; and

3. The plaintiff teachers were duly accorded due process as required by the 14th Amendment of the Constitution of the United States and Article 1 of the Constitution of the State of Wisconsin.

Therefore, the defendants' motion for summary judgment must be granted. Counsel for the defendants are directed to prepare an order consistent with the foregoing decision and present the same to this Court for signature

within fifteen (15) days from today, after obtaining approval of plaintiffs' counsel as to form.

Dated: July 19, 1974

By THE COURT
/s/ ALLAN J. DECHR
Circuit Judge

APPENDIX III

TRANSCRIPT OF DECISION ON APPELLANTS' MOTION FOR A TEMPORARY RESTRAINING ORDER

(From the Bench)
April 11, 1974

The Court: Ladies and gentlemen, I will read my decision in this case. I will ask that everyone who is in the courtroom remain present. I don't anticipate more than about fifteen, twenty minutes, so please remain present so we don't have people getting up and leaving during the course of my decision. And, Counsel, inasmuch as I did not interrupt arguments this afternoon I of course, request the same courtesy in delivering my opinion this evening.

As I am sure each one of you can realize perhaps the most difficult part of being a judge is to hear a case of this magnitude, a case that is not only important to the plaintiffs, not only important to the defendants, but a case that reaches far beyond the walls of this courtroom. It reaches out to the people in the Hortonville School District, and perhaps most important—to the children in that school district.

Over the last couple of days you have heard many legal principles expounded here in the courtroom, some fine legal hairs split, arguments on evidence, but in the great scheme of things we shouldn't lose track of the fact that we are attempting to do justice. and that in a matter such as this, unfortunate as it is, the courtroom is the place where these decisions are to be made.

The Court's decision in this case is not going to resolve the conflict that now exists. As in any labor dispute the

place to reach agreement is at the bargaining table, not in the courtroom, not on the streets, and not in the news media. I think most of you are aware that in the courtroom this evening are the three commissioners of the Wisconsin Employment Relations Commission and they have been here since yesterday. One of them since Sunday at my request. The other two joined us yesterday at the request of Governor Lucy. This is an important case and the eyes of the State are upon us. They are upon you the participants and how you conduct yourself after you leave the courtroom this evening.

I will now read my opinion.

The Circuit Court jurisdiction is created and limited by Article 7 Section 8 of the Wisconsin Constitution. I might just interrupt myself and preface any further remarks by saying I believe this case to be of such magnitude that the Court is going to couch its decision in legal terms as much as possible not for the sake of confusing you so that it takes you two hours to figure out what I said or what I did, but I think it is a case of such magnitude that either side may want to appeal the decision of this Court, therefore, my decision is basically in legal terminology so that I might facilitate that process, if that is sought.

The Constitution reads the Circuit Court shall have original jurisdiction in all matters civil and criminal within the state, not excepted in this Constitution, and not hereafter prohibited by law.

As to the matter now before the Court, I find no prohibition or limitation of this Court's jurisdiction in the Constitution.

As to applicable statutory law we must look to, first of all, Wisconsin Statute 253.03. That statute in broad terms

delineates the broad powers of the Circuit Court, limiting such powers only when exclusive jurisdiction is given to some other court. Within that same delineation, that statute expresses that, and I quote as to the powers of the Circuit Courts: "they have all the powers, according to the usages of courts of law and equity, necessary to the full and complete jurisdiction of the causes and parties and the full and complete administration of justice."

The nature of the relief requested at this time is equitable in nature. The procedure utilized in seeking that equitable relief is by way of an application for a temporary injunction as controlled by Chapter 268 of the Wisconsin Statutes. A careful reading of that Chapter of the Statutes will indicate that reference is only made to courts of record, judges and court commissioners. There is noticeably absent from that Chapter express authority for administrative agencies granting injunctive relief.

However, the matter at Bar is one which unquestioningly arose out of a labor dispute. More specifically, a labor dispute in the public employment sector. As such, the Court must give due consideration to the provisions of Section 111.70 of the Wisconsin Statutes. That particular statute creates certain procedures to be followed when labor disputes arise in the public employment sector.

Briefly, Section 111.70 enumerates various prohibited practices as well as the powers of the Wisconsin Employment Relations Commission in dealing with those prohibited practices. Furthermore, the procedures to be followed by the Wisconsin Employment Relations Commission in relation to those prohibited practices are controlled by Section 111.07 of the Statutes.

Upon a review of the pleadings, testimony and the evidence in this case by way of exhibits I find no prohibited practices as defined in Section 111.70(3) to either be alleged or proved. I can see no basis for jurisdiction in the Wisconsin Employment Relations Commission in the limited issues before this Court.

The issue before the Court is one of constitutional origin, namely due process. While the Wisconsin Employment Relations Commission may concern itself with due process on occasion, it does so in a collateral fashion. However, I do not want to indicate that the Wisconsin Employment Relations Commission does not have jurisdiction in other areas of this particular labor dispute.

As to the principle citations called to the Court's attention by counsel for the defendants the Seebruch case reported in 74 L.R.R.M. 2988, and the Lewis case, Columbia County case number 12456 it must be pointed out, Gentlemen, that each of those cases involved either an alleged unfair labor practice (Lewis) or an alleged prohibited practice (Seebruch). Such is not the case in this situation.

Accordingly, the Court having deemed the limited issue in this case to be one of constitutional due process rights, I specifically find that this Court has jurisdiction to hear the request for injunctive relief.

As to the second issue, whether injunctive relief should be granted, this Court must indeed, as invited by plaintiff's counsel, look at substance rather than form. The substance of this matter is and I specifically find:

(1) The plaintiffs and members of their class are teachers who signed individual 1973-74 contracts with the Hortonville Joint School District No. 1.

(2) The 1973-74 individual contracts incorporated by reference the 1972-73 school year master collective bargaining agreement.

(3) The plaintiffs and members of their class have engaged in a strike against the Hortonville Joint School District No. 1 since March 18, 1974, and up to the present.

(4) Each of the plaintiffs and members of their class received notices of termination of their employment as teachers for the aforesaid school district, effective April 2, 1974.

Now I want to clarify that so there is no misunderstanding. I am not finding whether or not those terminations are valid or invalid. I am making no such judgment.

The thrust of the plaintiffs' position has been throughout these proceedings that they are on strike with justification. That such justification is in brief a conspiracy by the defendants to fire certain of the plaintiffs and members of their class by utilizing methods which were calculated to provoke the present strike. Such a strike, as viewed by the plaintiffs, would enable the defendants to hire at random from the ranks once the strike had begun and once their employment was terminated.

This Court has taken the position that the reasons for the strike as well as the reasons for the alleged discharge are not relevant to the scope of this proceeding. This Court has, therefore, so limited the presentation of evidence in those respects.

Counsel for the plaintiffs has cited a number of cases holding that certain strikes are justifiable in spite of existing collective bargaining agreements which provide to the con-

trary. Those cases, however, are not applicable to the public sector in the State of Wisconsin. The law in Wisconsin on this point is clear and succinct as set forth in Wisconsin Statute 111.70 (4) (1) and I quote: "Nothing contained in this subchapter shall constitute a grant of the right to strike by any county or municipal employee and such strikes are hereby expressly prohibited.

That statute does not say nor has any Court in this state interpreted that statute to provide that strikes are expressly prohibited except when there is just cause. The legislative policy on this point is clear. Section 111.01(4) of the Wisconsin Statutes provides: "It is the policy of this state in order to preserve and promote the interests of the public, the employe, and the employer, alike, to establish standards of fair conduct in employment relations and to provide a convenient, expeditious and impartial tribunal by which these interests may have their respective rights and obligations adjudicated. While limiting individual and group rights of aggression and defense, the state substitutes processes of justice for the more primitive methods of trial by combat."

It is the further argument of the plaintiffs that the chain of cause and effect in this case is substantially as follows: That the defendants committed certain acts; those acts of defendants caused the strike; the strike caused the discharge and termination of employment notices to be sent on April 2nd, 1974. But, as I previously indicated, Wisconsin law does not give validity to the provocation-justified strike theory. Therefore, one must look to the strike, the termination of the employment notices chain of cause and effect.

Although the case of David Adler and Sons Company vs. Maglio, 200 Wisconsin 153 is prior to recent developments and statutes in the area of labor law, the principles of that case are equitable in nature and they hold true today as they did back in 1921. The Court said in part in that case on page 159: ". . . the portals of equity are closed to those who come seeking relief from the consequences which naturally flow from deliberate wrongs committed by the applicant for relief. 'A court of equity acts only when and as conscience commands, and if the conduct of the plaintiff be offensive to the dictates of natural justice, then, whatever use he may make of them in a court of law, he will be held remediless in a court of equity.' "

There is ample testimony in the record that the plaintiffs discussed the possible consequences of their strike, one of those consequences being potential termination of their employment.

This Court can only conclude that the plaintiffs have deliberately caused their present predicament and that therefore, they stand before this Court this evening with what is legally termed "unclean hands.".

As to the showing of possible success by the plaintiffs in the underlying lawsuit, let it suffice to say that if that was the only issue to be considered in granting injunctive relief, this Court would not deny such relief.

However, the possible success of ultimately prevailing is not the sole consideration. The second consideration is whether irreparable damage will be sustained by the plaintiffs as a result of any of the defendants' acts.

Irreparable damage means damage which either cannot be corrected at a future date or if corrected at a future date it will be too late to accomplish justice. In essence, irreparable damage is that for which no adequate remedy can be found to rectify.

The evidence in this case has proven that each of the plaintiffs who testified are suffering and will continue to suffer economic loss as a result of the termination notices which were sent to them April 2, 1974. Surely the job market for teachers at this time of the year is poor and there is obviously little hope that the picture will be better in the near future. But the fact remains that between March 18 and at least until April 2, 1974, the plaintiffs deliberately chose to sustain such economic loss, as well as any resulting consequences. When the testimony closed this afternoon it was apparent that the strike still continues. The plaintiffs still choose by their own doing a route that is obviously causing economic loss, economic hardship. This, however, is not like a garnishment action which was mentioned in the course of argument. In a garnishment action the debtor is deprived of his property as the result of a sudden seizure of his property, a decision in which he has no choice. The same cannot be said here. The plaintiffs had a choice and they have made it.

The Court is also of the opinion that in spite of the temporary economic loss, temporary economic hardships the plaintiffs do have adequate remedies by which they may refer such financial losses if they prevail in any of those remedies. There is a grievance procedure available under their contract for the 1973-74 school year. There are possible procedures before the Wisconsin Employment Relations Commission. There are possible suits for breach of contract, and there is already the underlying lawsuit in this case.

While the decision is difficult for the Court to make, as much as the Court can sympathize with the plaintiffs as well as the defendants in this most difficult decision, the Court must and does hereby for the reasons afore

stated deny the plaintiffs application for a temporary injunction.

Counsel for the defendants are directed to draft an appropriate order to that effect within five days, the same to be furnished to counsel for the plaintiffs for approval as to form.

Thank you, we stand adjourned. (6:59 p.m.)

APPENDIX IV

CORRECTED ORDER

Sirs:— the Court today announced decision in your case as follows:

HORTONVILLE EDUCATION ASSOCIATION, et al. v. HORTONVILLE JOINT SCHOOL DISTRICT NO. 1, et al., #657.

The motion of respondents for an order to stay enforcement of the decision of this Court rendered February 5, 1975, for a reasonable period of time, having been considered by the Court,

IT IS ORDERED that the motion of the respondents for stay of the enforcement of the decision of this court rendered February 5, 1975, for a reasonable period of time is hereby granted.

IT IS FURTHER GRANTED that the enforcement of this decision is stayed for a period of ninety (90) days from the date of this order or until the further order of this court.

Respectfully yours,

Clerk of Supreme Court
ROBERT O. UEHLING

467 F4

APPENDIX V

Wisconsin Statutes Section 111.70 (3) and 5

PROHIBITED PRACTICES AND THEIR PREVENTION.

(a) It is a prohibited practice for a municipal employer individually or in concert with others:

. . .

3. To encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment; but the prohibition shall not apply to a fair-share agreement.

. . .

5. To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employes, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement or to accept the terms of such arbitration award. where previously the parties have agreed to accept such award as final and binding upon them.

APPENDIX VI

STATE OF WISCONSIN

DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS

EMPLOYMENT SECURITY

Unemployment Compensation

APPEAL TRIBUNAL DECISION

In the matter of the unemployment benefit claim of
DAVID T. HANKE
1178 Church Street
Lomira, WI 53048
Employe, Appellant

involving the account of
HORTONVILLE PUBLIC SCHOOL
c/o Martin Obry
246 N. Olk Street
Hortonville, WI 54944
Employer, Respondent

APPEAL AND BENEFIT RIGHTS

This decision will become final unless within *14 days* from its date either party files with a representative of a local employment security office a written petition for review by the Industry, Labor and Human Relations Commission. If such a petition is filed it must contain the claimant's name and social security number. Such a review is conducted without the attendance of parties and no further hearing will be held unless the Commission so orders.

Any benefits that may be payable in accordance with this decision will not be withheld pending the expiration of the appeal period or if an appeal is filed, as required by section 108.09 (9) (a) of the statutes. However, if a final decision in this case results in denial of benefits, any benefits already paid pursuant to this decision will be deemed an erroneous payment which the employe will be required to pay.

"A RESPONDENT who failed to appear but who desires another opportunity for a hearing must, within ten days after the hearing date, or within the 5 days after the date of this decision, show to the Appeal Tribunal a satisfactory explanation of such failure".

HEARING NO. 75-A-22OFF

LO & S.S. NO. 06/393-54-6842

DATE OF DETERMINATION January 21, 1975

DATE OF APPEAL February 4, 1975

DATE OF HEARING April 9, 1975

PLACE OF HEARING Fond du Lac, Wisconsin

EXAMINER Ronald I. Weisbrod

DATE DECISION ISSUED & MAILED May 23, 1975

THE EMPLOYE SHOULD CONTINUE TO REGISTER FOR WORK AND FILE CLAIMS FOR BENEFITS SO LONG AS HE/SHE IS OUT OF WORK.

See attachment for applicable statutory or administrative code provision indicated by X

APPEARANCES

For the Employe or Claimant
(Attorney/Agent, if any)
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222 W. Washington Avenue
Suite 400
Madison, WI 53703

For the Employer
(Attorney/Agent, if any)
James Ruhly
Attorney at Law
309 Insurance Bldg.
1119 Manona Avenue
Madison, WI 53703

A DEPARTMENT DEPUTY'S INITIAL DETERMINATION HELD: That the employe was discharged in week 11 of 1974, for misconduct connected with his employment. Accordingly, benefits were denied.

Based on the applicable records and evidence in this case, the appeal tribunal makes the following

FINDINGS OF FACT

The employe worked during seven months as a music teacher for the employer, a public school district. His last day of work was on March 17, 1974 (week 12).

For quite some time the Hortonville Educational Association had been attempting to bargain with the Hortonville School Board regarding a master contract for the 1973-74 school year. No agreement had been reached and finally, negotiations were broken off.

On March 18, 1974 (week 12), the employe met with a large number of other teachers at a building housing the Hortonville Educational Association's office. Following this meeting, the employe and many of the other teachers walked together to the site of the Hortonville High School, arriving at about his normal starting time of 8 a.m. However, he did not report to his classroom. He took a sign and walked back and forth in front of one of the entrances to the school building. Out of a total of 90 teachers, only two reported for work that day.

On March 29, 1974 (week 13), the Hortonville Board of Education president mailed a letter to the employe to the effect that the Board had been informed that he had breached his individual employment contract and had engaged in an unlawful strike contrary to Wisconsin law. He was notified that a hearing was set for April 2, 1974 (week 14), at which time he could appear to present evidence regarding his alleged conduct.

On April 2, 1974 (week 14), the employe appeared at the scheduled hearing, but did not speak. An attorney spoke for him and the other members of the Education Association. Following that hearing, the president of the Board of Education mailed a letter to the employe advising him that his employment was terminated for breaching his individual employment contract and engaging in strike activity contrary to Wisconsin law. Whereupon, his employment ended.

From March 18, 1974 (week 12), through April 2, 1974 (week 14), the employe was absent from work. At no time did he contact the employer to offer a valid reason for his absences, which was contrary to the employer's work rules. In addition, on July 27, 1973 (week 30), he

had signed a contract with the Hortonville Board of Education agreeing to teach during 180 days commencing on August 27, 1973 (week 35). Contrary to his contract, he failed to report for school during several weeks when classes were scheduled.

He acknowledged that as of April 2, he still refused to report for work. He acknowledged that he did not advise the employer personally that he was interested in further employment with the school district.

From March 18, 1974 (week 12) through April 2, 1974 (week 14), the employe performed no services for the employer. It is apparent that his actions were part of a concerted effort by an organized group of workers not to report to their jobs. He acknowledged that he took part in this work stoppage in order to get both the school board and the Educational Association back to negotiating a contract. Moreover, he was aware that section 111.70 of the statutes provides that strikes by municipal employes, including teachers, are expressly prohibited. He was warned by the employer that his breaching of his employment contract by failing to report for work and his withholding of services contrary to state law could result in his discharge.

In a landmark decision by our Supreme Court, the term "misconduct" was defined as follows:

> ". . . the intended meaning of the term 'misconduct' as used in (the) Stats., is limited to conduct evincing such wilful or wanton violations or disregard of standards of behavior which the employer has a right to expect of his employe, or in carelessness or negligence of such degree or reoccurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional or substantial disregard of the employer's interests or of the employe's duties or obligations to the employer." *Boynton Cab Co. v. Neubeck* (1941), 237 Wis. 249, 259, 296 N.W. 636.

In cases too numerous to mention, the courts have ruled that failure to report for work or notify the employer of a valid reason for absence constitutes misconduct.

In *Allison v. Mt. Carmel Nursing Home & DILHR*, Dane County Circuit Court, Case No. 139294, August 22, 1974, the court held that the action of nursing home workers striking in violation of a no-strike clause in their contract, constituted misconduct.

Under the circumstances, the employe's actions in failing to report for work on days scheduled for school, without notice to the employer or valid reason for his absences; in participating in an organized work stoppage and strike, contrary to state statute, and after warnings from the employer, evinced a wilful, intentional and substantial disregard of the employer's interests and of the standards of behavior the employer had a right to expect of him.

The appeal tribunal therefore finds that the employe was discharged in 1974 week 14, for misconduct connected with his employment, within the meaning of section 108.04 (5) of the statutes.

DECISION

The department deputy's initial determination is affirmed. Accordingly, benefits are denied based on employment with the employer, and the employe is also ineligible for benefits based on employment by previous employers, in weeks 14 through 17 of 1974.

APPEAL TRIBUNAL
/s/ RONALD I. WEISBROD
Examiner

APPLICABLE STATUTORY PROVISION IS INDICATED BY X

108.04 ELIGIBILITY FOR BENEFITS. (5) DISCHARGE FOR MISCONDUCT. An employe's eligibility, for benefits based on those credit weeks then accrued with respect to an employing unit, shall be barred for any week of unemployment completed after he has been discharged by the employing unit for misconduct connected with his employment; provided, moreover, that such employe shall be deemed ineligible for benefits (from other previous employer accounts) for the week in which such discharge occurred and for the 3 next following weeks.

108.04 (6) DISCIPLINARY SUSPENSION. As to an employe's weeks of unemployment by reason of a disciplinary suspension by a given employer, the employe shall be ineligible for benefits as follows:

(a) If the suspension was for misconduct connected with his employment, he shall be ineligible from the given employer's account for each such week and ineligible from other previous employer accounts for the first 3 such weeks.

(b) If the suspension was for other good cause connected with his employment, he shall be ineligible for the first 3 such weeks.

108.04 (7) VOLUNTARY TERMINATION OF EMPLOYMENT. (a) If an employe terminates his employment with an employing unit, he shall be ineligible for any benefits for the week of termination and thereafter until he has again been employed within at least 4 weeks in each of which he worked at least 20 hours, except as hereinafter provided.

(b) Paragraph (a) shall not apply if the department determines that the employe terminated his employment with good cause attributable to the employing unit.

(c) Paragraph (a) shall not apply if the department determines that the employe terminated his employment but had no reasonable alternative because he was physically unable to do his work or because of the health of a member of his immediate family; but if the department determines that he is physically unable to work or substantially unavailable for work, he shall be ineligible while such inability or unavailability continues.

(f) Paragraph (a) shall not apply if the department determines that the employe terminated his employment because he was transferred by his employing unit to work paying less than two-thirds of his immediately preceding wage rate with the employing unit; provided that he shall be ineligible for benefits for the week of termination and the 4 next following weeks.

(g) Paragraph (a) shall not suspend an employe's eligibility for benefits based on employment for other previous employers if the department determines that the employee:

1. Maintained a temporary residence near the employment terminated; and

2. Maintained a permanent residence in another locality; and

3. Terminated such employment and returned to his permanent residence because the work available to him had been reduced to less than 20 hours per week in at least 2 consecutive weeks.

(h) 1. Any benefits paid based on the employment terminated to which par. (a) is applied shall be charged against the fund's balancing account; but the employer shall be recognized as an interested party.

2. Subdivision 1 shall not apply if the employer is exempt from the contribution requirements of ss. 108.17 and 108.18 under s. 108.15 or 108.151.

Supreme Court, U. S.
FILED
NOV 18 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1606

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; BOARD OF EDUCATION OF HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; ROGER WEIHING, ROBERT HAUK, JEAN MEADS, FLOYD MEYER, MERLIN PLAMANN, VICTOR SCHROTH and RONALD SURPRISE, individually and as officers and members of the Board of Education of Hortonville Joint School District No. 1; and MARVIN OBRY, ROBERT KOHLS and GENE RIEDL, individually and as administrators of Hortonville Joint School District No. 1,

PETITIONERS,

v.

HORTONVILLE EDUCATION ASSOCIATION and MICHAEL WISNOSKI, ROSE MARIE OLSON, THOMAS NADEAU, JUDY MURPHY, RUSSEL LICHTE and RONALD HAMMOND,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

PETITION FOR CERTIORARI FILED JUNE 19, 1975
CERTIORARI GRANTED OCTOBER 6, 1975

MICHAEL RODAK, JR., CLERK
NOV 18 1975
FILED
Supreme Court, U. S.

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

April 5, 1974 - Plaintiffs' Order to Show Cause, Summons, Complaint and Affidavits in Support of Order to Show Cause, filed in circuit court, Outagamie County, Wisconsin.

April 9, 10 and 11, 1974 - Hearing held on plaintiffs' application for temporary injunction before the Honorable Allan J. Deehr, Circuit Judge.

April 24, 1974 - Defendants' answer filed.

April 25, 1974 - Circuit court's order denying temporary injunction, filed.

May 31, 1974 - Plaintiffs' amended complaint filed.

June 5, 1974 - Circuit court's pre-trial order filed, granting leave to file amended complaint and extending time for summary judgment motions.

June 20, 1974 - Defendants' answer to first cause of action in amended complaint and demurrer to stated second, third and fourth causes of action, filed.

June 26, 1974 - Plaintiffs' notice of motion and motion for order overruling demurrers, filed.

June 27, 1974 Transcript of circuit court's April 11, 1974 decision from the bench denying temporary injunction, filed.

June 27, 1974 - Defendants' notice of motion and mo-

tion for summary judgment, and affidavit in support of motion for summary judgment, filed.

June 27, 1974 - Plaintiffs' affidavit in opposition to defendants' motion for summary judgment, filed.

July 19, 1974 - Circuit court decision filed, granting motion for summary judgment to first cause of action in amended complaint.

July 19, 1974 - Circuit court decision filed, sustaining demurrers to second, third and fourth causes of action in amended complaint.

July 29, 1974 - Order granting motion for summary judgment and Order sustaining demurrers to second, third and fourth causes of action, filed.

August 27, 1974 - Judgment dismissing first cause of action filed.

September 4, 1974 - Notice of entry of judgment filed.

September 10, 1974 - Order to show cause and petition for leave to commence an original action filed by plaintiffs in the Wisconsin Supreme Court; order to show cause signed by Chief Justice Horace W. Wilkie.

September 24, 1974 - Order entered by Wisconsin Supreme Court denying petition for original action and setting briefing schedule if an appeal is taken from the circuit court's decision.

October 10, 1974 - Notice of appeal filed by plaintiffs in circuit court for Outagamie County, Wisconsin.

November 26, 1974 - Cause argued before the Wisconsin Supreme Court.

February 5, 1975 - Opinion of Wisconsin Supreme Court filed, and judgment of Wisconsin Supreme Court entered reversing the judgment of the circuit court and remanding for further proceedings.

February 21, 1975 - Order to show cause and temporary restraining order and petition therefor filed by plaintiffs in Wisconsin Supreme Court; order to show cause and temporary restraining order signed by Chief Justice Horace W. Wilkie

February 24, 1975 - Motions for rehearing by Appellants and Respondents filed in Wisconsin Supreme Court.

February 24, 1975 - Defendants' motion to vacate temporary restraining order and to deny permanent injunction, and affidavit in support thereof, filed.

February 24, 1975 - Order of Wisconsin Supreme Court filed, denying order to show cause and vacating temporary restraining order.

March 28, 1975 - Per Curiam decision of Wisconsin Supreme Court filed, denying motions for rehearing and revising a sentence in the February 5th opinion of the court.

April 17, 1975 - Respondents' motion for stay to permit application to Supreme Court of the United States for a writ of certiorari, filed in Wisconsin Supreme Court.

April 22, 1975 - Appellants' memorandum opposing request for stay filed.

April 30, 1975 - Order of Wisconsin Supreme Court filed, granting motion for stay and ordering such stay for a period of ninety (90) days or until further order of the court.

May 6, 1975 - Appellants' motion for reconsideration of stay order filed.

May 7, 1975 - Order of Wisconsin Supreme Court filed, denying motion for reconsideration of stay order.

June 9, 1975 - Appellants' motion to vacate stay order filed.

June 16, 1975 - Respondents' memorandum opposing motion to vacate stay order, filed.

June 19, 1975 - Petition for writ of certiorari filed in the United States Supreme Court.

July 7, 1975 - Appellants' affidavit in support of motion to vacate stay order, filed.

July 8, 1975 - Order of Wisconsin Supreme Court filed, denying motion to vacate stay order.

July 23, 1975 - Respondents' motion for continuance of the stay previously granted, filed with Wisconsin Supreme Court.

July 30, 1975 - Entry Omitted.

August 1, 1975 - Order of Wisconsin Supreme Court filed, denying motion for extension of stay.

August —, 1975 - Petitioners' application for stay of mandate of the Wisconsin Supreme Court pending review on certiorari, to William H. Rehnquist, Associate Justice, United States Supreme Court and Circuit Justice for the Seventh Circuit, filed.

August —, 1975 - Respondents' opposition memorandum to application for stay of mandate, to Justice Rehnquist, filed.

August 21, 1975 - Decision of Mr. Justice Rehnquist denying the application for stay of mandate, No. A-133 (74-1606), received by the Wisconsin Supreme Court.

October 6, 1975 Petition for ceriotiorari granted.

October 24, 1975 - Order of circuit court staying proceedings pending decision of United States Supreme Court, filed in Outagamie County Circuit Court.

STATE OF WISCONSIN OUTAGAMIE COUNTY CIRCUIT COURT

HORTONVILLE EDUCATION ASSOCIATION and MICHAEL WISNOSKI, ROSE MARIE OLSON, THOMAS NADEAU, JUDY MURPHY, RUSSEL LICHTE, and RONALD HAMMOND,

Plaintiffs,

vs.

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; BOARD OF EDUCATION OF HORTONVILLE JOINT SCHOOL DISTRICT NO. 1, ROGER WEIHING, ROBERT HAUK, JEAN MEADS, FLOYD MEYER, MERLIN PLAMANN, VICTOR SCHROTH, and RONALD SUPRISE, individually and as officers and members of the Board of Education of Hortonville Joint School District No. 1; and MARVIN OBRY, ROBERT KOHLS, and GENE RIEDL, individually and as administrators of Hortonville Joint School District No. 1,

Defendants.

ORDER TO SHOW CAUSE

TO: The defendants above-named.

On reading and filing the verified Complaint and the Affidavits of Michael Wisonski, Rose Marie Olson, Thomas Nadeau, Judy Murphy, Russel Lichte, and Ronald Hammond, and on the motion of Lawton & Cates, attorneys for the plaintiffs above-named;

IT IS ORDERED that the above-named defendants, and each one of them, show cause before me in the Circuit Court Room of the Outagamie County Court House, at 9:30 A.M., on April 10, 1974, why an injunction should not be granted temporarily restraining the said defendants, their administrators and any and all other of their agents, from hiring any permanent replacements for the plaintiffs, or any other teachers similarly situated, and ordering the defendants to rescind, and render null and void, any and all contracts with such permanent replacements, that might have been entered into, and ordering such other and further relief as is prayed for in the aforesaid Complaint; let a copy of this Order to Show Cause be served on said defendants, together with copies of the Complaint and Affidavits referred to above, not less than before said hearing;

* * *

Dated: April 4, 1974.

BY THE COURT:

/s/ GORDON MYSE
Judge
Outagamie County Circuit Court

STATE OF WISCONSIN OUTAGAMIE COUNTY
CIRCUIT COURT

[Caption omitted in printing]

SUMMONS

THE STATE OF WISCONSIN, TO SAID DEFENDANTS:

You are hereby summoned and required to serve upon Lawton & Cates, plaintiff's attorneys, whose address is 110 East Main Street, Madison, Wisconsin 53703, an answer to the complaint which is herewith served upon you, within twenty (20) days after service of this summons upon you, exclusive of the day of service, and in case of your failure to do so, judgment will be rendered against you according to the demand of the complaint.

Dated: April 4, 1974

/s/ BRUCE EHLKE
LAWTON & CATES
Attorneys for Plaintiffs
110 East Main Street
Madison, Wisconsin 53703

STATE OF WISCONSIN OUTAGAMIE COUNTY
CIRCUIT COURT

[Caption omitted in printing]

COMPLAINT

Case No. ——

COME NOW the plaintiffs above-named, by their attorneys, Lawton & Cates, and as and for a cause of action

against the above-named defendants, allege and show to the Court as follows:

1. Plaintiff, Hortonville Education Association (hereinafter "Association"), is a labor organization as defined at Section 111.70 (1) (j), of the Wisconsin Statutes. It is the collective bargaining representative of all teachers employed by the Hortonville Joint School District No. 1. Michael Wisnoski is the President of the Association.

Plaintiff Michael Wisnoski is a public school teacher. He resides with his wife and three (3) children at Route #1, North Road, Appleton, Wisconsin. At all times material hereto, he has been employed as a junior high school teacher by the Hortonville Joint School District No. 1, and he has been the President of the Association.

Plaintiff Rose Marie Olson is a public school teacher. She resides with her husband and two (2) children at 509 West Cedar Street, Hortonville, Wisconsin. At all times material hereto, she has been employed as a teacher by the Hortonville Joint School District No. 1.

Plaintiff Thomas Nadeau is a public school teacher. He resides with his wife and children at Roue # 1, Grandview Road, Hortonville, Wisconsin. At all times material hereto, he has been employed as a high school teacher by the Hortonville Joint School District No. 1.

Plaintiff Judy Murphy is a public school teacher. She resides with her children at 728 Chestnut Street, Neenah, Wisconsin. At all times material hereto, she has been employed as a guidance counselor by the Hortonville Joint School District No. 1.

Plaintiff Russel Lichte is a public school teacher. He resides with his wife at 2300 Woodrow Court, Appleton, Wisconsin. At all times material hereto he has been em-

ployed as a high school, junior high school, and elementary school teacher by the Hortonville Joint School District No. 1.

Plaintiff Ronald Hammond is a public school teacher. He resides with his three children at 518 Whitney Street, Kaukauna, Wisconsin. At all times material hereto, he has been employed as a junior high school teacher by the Hortonville Joint School District No. 1.

2. The plaintiffs individually named in paragraph 1 of this Complaint are representative of all teachers employed by the District whose employments the Board has acted to terminate. Said plaintiffs represent all other Hortonville teachers so situated, and the issues named in this Complaint are of common interest to all teachers in said class. Said class of teachers is too numerous, and it is impractical, to bring all of them before this Court. The named plaintiffs fairly and fully will represent all of the interests of all other teachers situated similarly to the individually-named plaintiffs.

3. Defendant Hortonville Joint School District No. 1 (hereinafter "District") is a public school district organized under the laws of the State of Wisconsin. The District is a municipal employer as defined at Section 111.70 (1) (2), of the Wisconsin Statutes. It has its offices at 211 East Union Street, Hortonville, Wisconsin. Defendant Board of Education of the District (hereinafter "Board") is a public body charged under Wisconsin law with the management of the District. It has its offices at 211 East Union Street, Hortonville, Wisconsin. The duly-elected and acting President of the Board is Roger Weihing, who resides at Route # 1, Appleton, Wisconsin.

Defendant Marvin Obry is the Superintendent of the District and agent of the Board. He has his office at 211 East Union Street, Hortonville, Wisconsin. Defendant Robert Kohls is the Hortonville High School Principal and agent of the Board. He has his office at 246 North Olk Street, Hortonville, Wisconsin. Defendant Eugene Riedl is the Hortonville Junior High School and Elementary Schools Principal and agent of the Board. He has his office at 211 East Union Street, Hortonville, Wisconsin.

The remaining individually-named defendants all are members of the Board. Robert Hauk, the Clerk of the Board, resides at 111 East Cedar Street, Hortonville, Wisconsin. Jean Meads resides at Route # 1, Hortonville, Wisconsin. Floyd Meyer resides at Route # 2, Appleton, Wisconsin. Merlin Plamann resides at 4510 North McArthy Road, Appleton, Wisconsin. Victor Schroth resides at Route # 1, Hortonville. Wisconsin. Ronald Suprise resides at Route # 2, Hortonville, Wisconsin.

4. Immediately prior to and during and immediately following the weekend of March 30 and 31, 1974, the individually-named plaintiffs, and all other teachers represented by the Association, were served notices that the Board had scheduled hearings for each and every one of them, at twenty-minute intervals, commencing Monday morning, April 1, 1974, through and until late on Wednesday evening, April 3, 1974. The timing of the said notices denied the plaintiffs and others who received similar notices a fair opportunity to consult with an attorney and to prepare a defense.

5. On Monday, April 1, 1974, the plaintiffs and other teachers appeared before the Board and objected to the

lack of a fair notice of the scheduled hearings, to the Board acting as the decision-maker in their cases, because of its involvement in the very circumstances which gave rise to the Board's consideration of the termination of their employments, and requested opportunity to present evidence in their defense, and in mitigation of reasons the Board might consider for termination of their employments. At the beginning of said appearance before the Board, the plaintiffs and the other teachers also requested the opportunity to examine adversary management personnel relative to the charges against them. All of the objections and requests made by the plaintiffs and by other teachers were denied by the Board, which acted on the advice of its attorney, James Ruhly, who also was the attorney responsible for presenting the charges and evidence against them.

6. By letters dated April 2, 1974, the plaintiffs and, on information and belief, almost all other teachers employed by the District, were notified by the Board that the Board had acted to terminate their employments. By these same letters, the plaintiffs and other teachers were invited individually to re-apply for employment with the district.

7. The Association, which represents the plaintiffs and the other teachers employed by the district, was not informed of the hearings scheduled by and before the Board for April 1, 2, and 3, 1974. The Association also was not given any advance notification of the Board's decision to terminate the employments of the plaintiffs and other teachers represented by the Association.

8. On information and belief, it is the intention of the Board and their administrators and agents, to hire permanent replacements for all teachers represented by the As-

sociation, including the plaintiffs, who have been discharged. The Board, and its administrators and agents, already have taken steps to begin recruitment of such permanent replacements and to hire such replacements.

9. There does not exist just cause for the discharge of the plaintiffs and other teachers represented by the Association. Circumstances existed that are a defense or mitigation of any reason the Board may have, or may have had, for the said discharges. The discharge of the plaintiffs, and of the other teachers represented by the Association, was and is in violation of the collective bargaining agreement in force between the Board and the Association, and said discharges are null and void.

10. All of the aforesaid acts by the Board and their administrators and agents have been done under color of law, intentionally and maliciously, in bad faith, by the named defendants acting individually and as part of conspiracy to deny the plaintiffs and other teachers similarly situated their lawful rights. Said acts by the Board and their agents have been done for the purpose of and have resulted in the plaintiffs and other teachers being denied employment with the district, which resulted in substantial injury to their personal and professional reputations, and to their ability to secure employment in their teaching profession, and caused them emotional upset and distress, and have caused them to incur expense. By said actions, the Board and the individually-named defendants have deprived the plaintiffs and other teachers similarly situated of property and liberty. Said actions have denied them individual rights secured under the fourteenth (14th) amendment to the U.S. Constitution, which denied them

substantive and procedural due process of law, and which denied them other legal rights.

11. On April 4, 1974, the plaintiffs and other teachers who were discharged by the Board, filed grievances as provided for under the collective bargaining agreement in force between the Association and the Board. The plaintiffs and others similarly situated are acting with all deliberate speed to make use of all contractual remedies available to them and, if necessary, to appeal for a hearing to the Wisconsin Employment Relations Commission (WERC) concerning their discharge.

12. The plaintiffs and all other teachers similarly situated have been discharged from their public employment without being afforded the fair notice and full and fair hearing required by constitutionally secured due process of law. Said denial by the Board and its agents of a fair pre-discharge hearing, and the Board and its agents recruitment and hiring of permanent replacements have caused and will cause irreparable harm to the plaintiffs and others similarly situated.

WHEREFORE, it is prayed that this Circuit Court enter its order granting judgment for the plaintiffs and others similarly situated:

A. declaring the aforesaid actions of the Board and its agents to be a denial of constitutionally-secured due process of law, and null and void;

B. ordering that the discharge of the plaintiffs and the other teachers represented by the Association be set aside, and declared null and void;

C. enjoining the defendants from recruiting and hiring any permanent replacements for the plaintiffs and others similarly situated, until such time as the plaintiffs and others similarly situated have been afforded a full and fair hearing that meets the requirements of constitutionally-secured due process of law, concerning their discharges;

D. enjoining the defendants to rescind and to revoke any contracts they have made for the permanent replacement of any of the plaintiffs or other teachers similarly situated;

E. ordering the Board to bargain in good faith commencing immediately and continuously until such time as the parties have resolved their labor dispute;

F. and that the Court grant such other and further relief as may be appropriate.

Date: April 4, 1974

LAWTON & CATES
Attorneys for Plaintiffs
By: /s/ BRUCE F. EHLKE

[Verifications omitted in printing]

STATE OF WISCONSIN OUTAGAMIE COUNTY
CIRCUIT COURT

[Caption omitted in printing]

AFFIDAVIT

STATE OF WISCONSIN
ss
OUTAGAMIE COUNTY

MICHAEL WISNOSKI, being first duly sworn, on oath, deposes and says as follows:

1. Your Affiant, Michael Wisnoski, is by profession a public school teacher. He is thirty-five (35) years of age, and resides with his wife, Donna, and their three (3) minor children at Route # 1, North Road, Appleton, Wisconsin.

2. At all times material hereto, your affiant has been a junior high school science teacher and science department chairman, and elementary science consultant employed by the Hortonville Joint School District No. 1. The present 1973-74 school year is his seventh year of employment by the said school district.

3. In addition to the normal expenses to feed, clothe and otherwise support himself, his wife, and children, your affiant also has mortgage payments to meet and car loan repayments to make. Your affiant is dependent on his salary to support himself and his family and to meet his financial obligations.

4. Since August, 1973, your affiant has been a duly-elected and acting president of the Hortonville Education

Association. During the 1972-73 school year, he was the president-elect of said Association. The Hortonville Education Association represents all teachers employed by the Hortonville Joint School District No. 1, and is the collective bargaining agent for said teachers.

5. The collective bargaining agreement presently in force between the Association and the Hortonville Board of Education provides a grievance procedure which includes an appeal to the Wisconsin Employment Relations Comission (WERC) for a hearing. The said collective bargaining agreement also provides that no teacher will be dismissed from employment without just cause.

6. At about 7:30 o'clock in the evening on Saturday, March 30, 1974, your affiant was served a notice by the Hortonville Board of Education that it had scheduled a hearing, to determine whether or not to discharge him, for Tuesday morning, April 2, 1974, at 9:20. Your affiant did not have an opportunity to consult with any attorney until Monday, April 1, 1974. To the best of your affiant's knowledge, all but two of the teachers represented by the Hortonville Education Association received hearing notices similar to the one he received. A copy of the notice he received is attached to this Affidavit as Exhibit A. Only individual teachers were notified of the scheduled Board hearings. The Association was not given any notice by the Board of said hearings involving the employees it represents.

7. On Monday, April 1, 1974, your affiant appeared, together with his attorney, before the Hortonville Board of Education. At that time he objected to the short notice he had been given of the discharge hearing scheduled by the

Board, and of his lack of opportunity to prepare any defense. This objection was dismissed by the Board. At the same time, he also objected to the Board sitting as the decision-maker in any hearing concerning his discharge, because the Board itself was involved as an adverse party in the very dispute that had generated the Board's action to discharge him. This objection too was dismissed by the Board. The request of your affiant to present evidence in his defense, and in mitigation of any conduct on his part that the Board might consider to be a basis for terminating his employment, also was denied by the Board. Both of his objections and his request were dismissed by the Board acting on the advice of its attorney, James Ruhly, who also was acting as the "prosecuting" attorney.

8. On April 3, 1974, your affiant received a letter from the Board of Education, a copy of which is attached to this Affidavit as Exhibit B, which letter notifies him that the Board had acted to terminate his employment with the Hortonville Joint School District No. 1. On that same day your affiant also received, in the mail, a copy of the Board resolution which decreed that all teachers represented by the Hortonville Education Association, except one, were discharged, and that the Board would dishonor the teaching contracts for the 1974-75 school year that it previously had tendered to said teachers. A copy of said Resolution is attached to this Affidavit as Exhibit C. To the best of your affiant's knowledge, all teachers represented by the Association received individual notices of a termination of their employment similar to the one received by your affiant.

9. On April 4, 1974, your affiant filed a grievance with the Hortonville Joint School District No. 1 protesting the

termination of his employment on the grounds that said termination of employment was without cause, in violation of the collective bargaining agreement in force between the Board of Education and his Association. To date, most of the teachers represented by the Association who received discharge notices similar to your affiant's, have filed grievances protesting said actions by the Board.

10. On information and belief, the Hortonville Board of Education and their administrators and agents intend to hire a teacher to replace your affiant on a permanent basis. To the knowledge of your affiant, the said Board and their administrators and agents similarly intend to hire permanent replacements for all other teachers represented by the Association whose employments have been terminated. If such a recruitment is permitted, and such hiring is accomplished, your affiant and his family, and all other teachers and families similarly situated will be harmed irreparably. The job market for public school teachers generally is very poor. At this particular time in the school year it virtually is non-existent.

11. This Affidavit is made in support of a motion that the Board of Education and its administrators and agents temporarily be enjoined from hiring any teachers to permanently replace your affiant or any other teachers similarly situated, until such time as a full and fair hearing, which meets the requirements of constitutionally-secured due process of law, may be afforded to them.

Dated this 4 day of April, 1974.

/s/ MICHAEL WISNOSKI
Plaintiff

[Subscription omitted in printing]

[EXHIBIT A, WISNOSKI AFFIDAVIT]

HORTONVILLE COMMUNITY SCHOOLS
246 North Olk Street
Hortonville, Wis. 54944
March 29, 1974

Mr. Michael Wisnoski
Route #1, Box 182E
Appleton, WI 54911

Dear Mr. Wisnoski:

The Board of Education for the Hortonville Community Schools has been informed by Superintendent Obry that since March 18, 1974:

You have breached your individual employment contract;

You have engaged in an unlawful strike contrary to Wisconsin law.

This alleged conduct, if true, subjects you to disciplinary action by the Board, including termination of your employment contract.

You are hereby notified that the Board of Education has set a hearing on this matter for Tuesday, April 2, 1974, at 9:20 o'clock in the forenoon, or as soon thereafter as you may be heard, at the high school library, 246 North Olk Street, Hortonville.

At this hearing you will be given the opportunity to present any statement or evidence relevant to this alleged conduct.

Be further advised that after such hearing the Board will notify you in writing of what disciplinary action, if any, the Board has determined appropriate.

FOR THE BOARD OF EDUCATION:

/s/ Roger Weihing
Roger Weihing, President

[EXHIBIT B, WISNOSKI AFFIDAVIT]

HORTONVILLE COMMUNITY SCHOOLS
246 North Olk Street
Hortonville, Wis. 54944
April 2, 1974

Mr. Michael Wisnoski
Route 1, Box 182E
Appleton, WI 54911

Dear Mr. Wisnoski:

Please be advised that the Board of Education met on April 2, 1974, and took the following action:

The Board found you guilty of the conduct set forth in Mr. Weihing's notice of March 29, 1974. Specifically, it found that since March 18, 1974:

You breached your individual employment contract;

You engaged in strike activity contrary to Wisconsin law.

The Board further found that these breaches of duty and law constitute good and sufficient cause for the immediate termination of your teaching contract.

Therefore, you are advised that your employment with the Hortonville Community Schools, Joint School District #1, Village of Hortonville, et al., is hereby terminated, effective immediately. Furthermore, this action includes the withdrawal of the offer of employment for the 1974-75 school term, and/or termination of such tendered employment contract. Be further advised that your district-paid WPS hospital insurance coverage will cease on April 30, 1974, unless you make contrary arrangements with the

insurance company. Information regarding other fringe benefits will be forthcoming to you in the near future.

The Board also directed the administration to commence recruitment, both from within and outside the district, for professional staff for the balance of the 1973-74 school year and thereafter. You are invited to apply for any teaching position if you are interested in further employment in our district. You should contact Superintendent Obry or a principal if you wish to so apply.

FOR THE BOARD OF EDUCATION:

/s/ Roger Weihing
Roger Weihing, President

[EXHIBIT C, WISNOSKI AFFIDAVIT]

RESOLUTION

Resolved, that all teachers, heretofore served with notice of hearing dated March 29, 1974, or who waived such service through legal representative, which notice alleged breach of employment contract and participation in an unlawful strike, are guilty of such conduct and are therefore hereby terminated as employees of this district, effective immediately, except Tonia Stamborski; that such termination of employment includes withdrawal of the tendered employment contract for the 1974-75 school year, and/or termination of said contract; that the Board President shall prepare, after consultation with counsel, and send, certified mail, return receipt requested, notice of such action to such employees; that said notice shall inform such terminated employees that his or her district-paid WPS hospital insurance is paid through the month of April, 1974; that said notice shall inform such terminated

employees that they may apply for vacant positions in the District, and that Tonia Stamborski be sent a letter by the Board President reprimanding her for her participation in the unlawful strike and her breach of her employment contract, with a copy of said notice to be inserted in her personnel file; and that a copy of this resolution be sent to the President of the Hortonville Education Association.

Adopted by the Board of Education
April 2, 1974

STATE OF WISCONSIN OUTAGAMIE COUNTY
CIRCUIT COURT

[Caption omitted in printing]

AFFIDAVIT

STATE OF WISCONSIN

ss.

OUTAGAMIE COUNTY

ROSE MARIE OLSON, being first duly sworn, on oath deposes and says as follows:

1. Your affiant, Rose Marie Olson, is by profession a public school teacher. She is thirty-seven (37) years of age, and resides with her husband, James Olson, and their two (2) adopted minor children at 509 West Cedar Street, Hortonville, Wisconsin. Your affiant's husband, James Olson, also is by profession a public school teacher.

2. At all times material hereto, both your affiant and her husband, James Olson, have been public school teachers employed by Hortonville Joint School District No. 1. Your affiant has been employed by the said Hortonville Joint School District No. 1, as an elementary school teacher, continuously during the past nine (9) school years, which employment has been regular, full-time employment during the present school year and the five (5) school years immediately preceding this present year. The husband of your affiant, James Olson, has been employed as a regular, full-time junior high school teacher by the same Hortonville Joint School District No. 1, during the present school year, and the ten (10) school years preceding this year.

3. In addition to the normal expenses necessary to feed, clothe, and otherwise support themselves and their children, your affiant and her husband also have two mortgage payments to meet. Your affiant and her husband, James Olson, are wholly dependent on their salaries to support themselves and their children and to meet their financial obligations.

4. At about 8 o'clock in the evening of Friday, March 29, 1974, your affiant was served a notice by the Board of Education of Hortonville Joint School District No. 1, that it had scheduled a hearing to determine whether or not to discharge her, at 2:30 o'clock in the afternoon of Monday, April 1, 1974. This meeting was scheduled to last for twenty (20) minutes. At the same time, at 8 o'clock in the evening of Friday, March 29, 1974, your affiant's husband was served with a notice by the same Board of Education notifying him that the said Board had scheduled a hearing to determine whether or not to discharge him, for 9:20 in the morning of Monday, April 1, 1974.

Neither your affiant nor her husband had opportunity to consult with any attorney until the morning of April 1, 1974.

5. On Monday morning, April 1, 1974, your affiant and her husband appeared, together with their attorney, before the Board of Education of Hortonville Joint School District No. 1. At that time, they objected to the short notice that they had been given of the discharge hearing scheduled by the Board, and of their lack of opportunity to prepare any defense. This objection was dismissed by the Board. At the same time they also objected to the Board of Education sitting as the decision-maker in any hearing concerning their discharge, for the reason that the Board itself was involved as an adversary party in the very labor dispute that had generated the Board's action to discharge them. This objection too was dismissed by the Board. The request of your affiant and her husband to present evidence in their defense and in mitigation of any conduct on their part, that the Board might consider as a basis for terminating their employments, also was denied by the Board. Both of these objections and the request were dismissed by the Board, acting on the advice of its attorney, James Ruhly, who also was acting as the "prosecuting" attorney against your affiant and her husband.

6. On April 3, 1974, both your affiant and her husband, James Olson, individually received letters from Board of Education President, Roger Weihing, which letters were notifying each of them individually that the Board had acted to terminate their employments with the Hortonville Joint School District No. 1. On April 4, 1974, both your affiant and her husband, each individually filed a

grievance with the Hortonville Joint School District No. 1, protesting the termination of their employments on the grounds that said terminations of employment were without cause, in violation of the collective bargaining agreement which is in force between the Board of Education of Hortonville Joint School District No. 1, and their union, the Hortonville Education Association.

7. On information and belief, the Board of Education of Hortonville Joint School District No. 1, and their administrators and agents, intend to hire teachers to replace both your affiant and her husband on a regular, full-time and permanent basis. If such a hiring is accomplished, your affiant, her husband, James Olson, and their children irreparably will be harmed. The job market for public school teachers at this time, and in particular at this time in the school year, virtually is nonexistent.

8. This Affidavit is made in support of a motion that the Board of Education, and its administrators and agents, temporarily be enjoined from hiring any teachers to replace your affiant and her husband, or any other teachers similarly situated.

Dated this 4th day of April, 1974.

/s/ ROSE MARIE OLSON
Plaintiff

[Subscription omitted in printing]

STATE OF WISCONSIN OUTAGAMIE COUNTY
CIRCUIT COURT

[Caption omitted in printing]

AFFIDAVIT

STATE OF WISCONSIN

ss.

OUTAGAMIE COUNTY

THOMAS NADEAU, being first duly sworn, on oath deposes and says as follows:

1. Your affiant, Thomas Nadeau, is by profession a public school teacher. He is thirty-six (36) years of age, and resides with his wife, Patricia Nadeau, and their three (3) minor children, at Route # 1, Grandview Road, Hortonville, Wisconsin.

2. At all times material hereto, your affiant, Thomas Nadeau, has been a public school teacher employed by Hortonville Joint School District No. 1. Your affiant has been employed by the said Hortonville Joint School District No. 1 as a high school biology teacher, continuously during the past seven (7) years, including the present 1973-74 school year.

3. In addition to the normal expenses necessary to feed, clothe, and otherwise support himself, his wife, and their children, your affiant also has a mortgage payment to meet. Your affiant is dependent on his salary to support himself, his wife, and children and to meet his financial obligations.

4. At about 8 o'clock in the evening of Friday, March 29, 1974, a notice was served by the Board of Education of Hortonville Joint School District No. 1 on the nine-year-old son of your affiant, which notice informed your affiant that the Board had scheduled a hearing, to determine whether or not to discharge him, at 11:20 o'clock in the forenoon of Monday, April 1, 1974. This meeting was scheduled to last for twenty (20) minutes. Your affiant did not have opportunity to consult with any attorney until the morning of April 1, 1974.

5. On Monday morning, April 1, 1974, your affiant appeared, together with his attorney, before the Board of Education of Hortonville Joint School District No. 1. At that time, he objected to the short notice that he had been given of the discharge hearing scheduled by the Board, and of his lack of opportunity to prepare any defense. This objection was dismissed by the Board. At the same time he also objected to the Board of Education sitting as the decision-maker in any hearing concerning his discharge, for the reason that the Board itself was involved as an adversary party in the very labor dispute that had generated the Board's action to discharge them. This objection too was dismissed by the Board. The request of your affiant to present evidence in his defense and in mitigation of any conduct on his part, that the Board might consider as a basis for terminating his employment, also was denied by the Board. Both of these objections and the request were dismissed by the Board, acting on the advice of its attorney, James Ruhly, who also was acting as the "prosecuting" attorney against your affiant.

6. On April 3, 1974, your affiant received a letter from

the Board of Education President Roger Weihing, which letter notified him that the Board had acted to terminate his employment with the Hortonville Joint School District No. 1. On April 4, 1974, your affiant signed a grievance with the Hortonville Joint School District No. 1, protesting the termination of his employment on the grounds that said termination of employment was without cause, in violation of the collective bargaining agreement which is in force between the Board of Education of Hortonville Joint School District No. 1, and their union, the Hortonville Education Association. In the same letter your affiant was notified that the Board also would dishonor the teaching contract it had tendered to him for the 1974-75 school year. The present job market for public school teachers, particularly at this time of the school year, virtually is non-existent.

7. On information and belief, the Board of Education of Hortonville Joint School District No. 1 and their administrators and agents, intend to hire a teacher to replace your affiant, on a permanent basis. If recruiting for such a hiring is permitted, and if such a permanent hiring is accomplished, your affiant, and his family, will be harmed irreparably.

8. This Affidavit is made in support of a motion that the Board of Education, and its administrators and agents, temporarily be enjoined from permanently hiring any teacher to replace your affiant or any other teacher similarly situated.

Dated this 4 day of April, 1974.

/s/ THOMAS NADEAU
Plaintiff

[Subscription omitted in printing]

STATE OF WISCONSIN OUTAGAMIE COUNTY
CIRCUIT COURT

[Caption omitted in printing]

AFFIDAVIT

STATE OF WISCONSIN
ss.
OUTAGAMIE COUNTY

JUDY MURPHY, being first duly sworn, on oath deposes and says as follows:

1. Your affiant, Judy Murphy, is by profession a public school teacher. She is forty-two (42) years of age, and resides with her two minor sons at 728 Chestnut Street, Neenah, Wisconsin. She also has a daughter who is a freshman in college.

2. At all times material hereto, your affiant has been a public school teacher employed by Hortonville Joint School District No. 1. Your affiant has been employed by the said Hortonville Joint School District No. 1 as a guidance counselor in the junior and senior high schools, which employment has been regular, full-time employment during the present school year and the two (2) school years immediately preceding this present year.

3. In addition to the normal expenses necessary to feed, clothe, and otherwise support herself and her three children, your affiant also has a mortgage payment to meet, as well as the expenses incidental to her daughter's college enrollment. Your affiant is dependent on her salary to support herself and her three (3) children and to meet her financial obligations.

4. At about 10:30 o'clock in the morning of Monday, April 1, 1974, your affiant was served a notice by the Board of Education of Hortonville Joint School District No. 1, that it had scheduled a hearing to determine whether or not to discharge her, at 10:40 o'clock in the evening of Wednesday, April 2, 1974. Your affiant did not have an opportunity to consult with an attorney until Monday, April 1, 1974.

5. On Monday, morning, April 1, 1974, your affiant appeared, together with her attorney, before the Board of Education of Hortonville Joint School District No. 1. At that time she objected to the short notice that she had been given of the discharge hearing scheduled by the Board and of her lack of opportunity to prepare her defense. This objection was dismissed by the Board. At the same time she also objected to the Board of Education sitting as the decision-maker in any hearing concerning her discharge, for the reason that the Board itself was involved as an adversary party in the very labor dispute that had generated the Board's action to discharge them. This objection too was dismissed by the Board. The request of your affiant to present evidence in her defense, and in mitigation of any conduct on her part that the Board might consider as a basis for terminating her employment, also was denied by the Board. Both of these objections and the request were dismissed by the Board, acting on the advice of its attorney, James Ruhly, who also was acting as the "prosecuting" attorney against your affiant.

6. On April 3, 1974, your affiant received a letter from the Board of Education President Roger Weihing, which letter was notifying her that the Board had acted to

terminate her employment with the Hortonville Joint School District No. 1. On April 4, 1974, your affiant filed a grievance with the Hortonville Joint School District No. 1, protesting the termination of her employment on the grounds that said termination of employment was without cause, in violation of the collective bargaining agreement which is in force between the Board of Education of Hortonville Joint School District No. 1, and her union, the Hortonville Education Association.

7. On information and belief, the Board of Education of Hortonville Joint School District No. 1, and their administrators and agents, intend to hire a teacher to replace your affiant on a permanent basis. If such a hiring is accomplished, your affiant and her children irreparably will be harmed. The job market for public school teachers at this time, and in particular at this time in the school year, virtually is non-existent.

8. This Affidavit is made in support of a motion that the Board of Education and its administrators and agents, temporarily be enjoined from hiring any teachers to replace your affiant or any other teachers similarly situated.

Dated this 4 day of April, 1974.

/s/ JUDY MURPHY
Plaintiff

[Subscription omitted in printing]

STATE OF WISCONSIN OUTAGAMIE COUNTY
CIRCUIT COURT

[Caption omitted in printing]

AFFIDAVIT

STATE OF WISCONSIN

ss.

OUTAGAMIE COUNTY

RUSSELL LICHTE, being first duly sworn, on oath deposes and says as follows:

1. Your affiant, Russel Lichte, is by profession a public school teacher. He is twenty-six (26) years of age, and resides with his wife, Lynn Lichte, at 2300 Woodrow Court, Appleton, Wisconsin.

2. At all times material hereto, your affiant, Russel Lichte, has been a public school teacher employed by Hortonville Joint School District No. 1. Your affiant has been employed by the said Hortonville Joint School District No. 1 as an elementary and junior high school physical education teacher and junior high and high school math teacher for two (2) continuous years, which employment has been regular, full-time employment during the present school year and the school year immediately preceding this present year.

3. In addition to the normal expenses necessary to feed, clothe and otherwise support himself and his wife, your affiant also has to pay rent. Your affiant, Russel Lichte, is wholly dependent on his salary to support himself and his wife and to meet their financial obligations.

4. At about 7:45 o'clock in the morning of Saturday, March 30, 1974, your affiant was served a notice by the Board of Education of Hortonville Joint School District No. 1, that it had scheduled a hearing to determine whether or not to discharge him, at 2:10 o'clock in the afternoon of Tuesday, April 2, 1974. This meeting was scheduled to last for twenty (20) minutes. Your affiant did not have an opportunity to consult with any attorney until Monday, April 1, 1974.

5. On Monday morning, April 1, 1974, your affiant appeared together with his attorney, before the Board of Education of Hortonville Joint School District No. 1. At that time, he objected to the short notice that he had been given of the discharge hearing scheduled by the Board, and of his lack of opportunity to prepare any defense. This objection was dismissed by the Board. At the same time he also objected to the Board of Education sitting as the decision-maker in any hearing concerning his discharge, for the reason that the Board itself was involved as an adversary party in the very labor dispute that had generated the Board's action to discharge him. This objection too was dismissed by the Board. The request of your affiant to present evidence in his defense, and in mitigation of any conduct on his part that the Board might consider as a basis for terminating his employment, also was denied by the Board. Both of these objections and the request were dismissed by the Board, acting on the advice of its attorney, James Ruhly, who also was acting as the "prosecuting" attorney against your affiant.

6. On April 3, 1974, your affiant received a letter from the Board of Education President Roger Weihing, which

letter was notifying him that the Board had acted to terminate his employment with the Hortonville Joint School District No. 1. On April 4, 1974, your affiant filed a grievance with the Hortonville Joint School District No. 1, protesting the termination of his employment on the grounds that said termination of employment was without cause, in violation of the collective bargaining agreement which is in force between the Board of Education of Hortonville Joint School District No. 1, and their union, the Hortonville Education Association.

7. On information and belief, the Board of Education of Hortonville Joint School District No. 1, and their administrators and agents, intend to hire teachers to replace your affiant on a regular, full-time and permanent basis. If such a hiring is accomplished, your affiant, Russel Lichte, and his wife, irreparably will be harmed. Among other things, if your affiant must depend on his wife to support him, he and his wife will be unable to have children and to raise a family. The job market for public school teachers at this time, and in particular at this time of the school year, virtually is non-existent.

8. This Affidavit is made in support of a motion that the Board of Education, and its administrators and agents, temporarily be enjoined from hiring any teachers to replace your affiant and/or any other teachers similarly situated.

Dated this 4 day of April, 1974.

/s/ RUSSEL LICHTE
Plaintiff

[Subscription omitted in printing]

STATE OF WISCONSIN OUTAGAMIE COUNTY

CIRCUIT COURT

[Caption omitted in printing]

AFFIDAVIT

STATE OF WISCONSIN
ss.
OUTAGAMIE COUNTY

RONALD HAMMOND, being first duly sworn, on oath, deposes and says as follows:

1. Your affiant, Ronald Hammond, is by profession a public school teacher. He is thirty-four (34) years of age, a widower, and reides with his three (3) minor children, ages 7, 9, and 11, at 518 Whitney Street, Kaukauna, Wisconsin.

2. At all times material hereto, your affiant, Ronald Hammond, has been a public school teacher employed by Hortonville Joint School District No. 1. Your affiant has been employed by the said Hortonville Joint School District No. 1 as a junior high school (grades 7 and 8) language arts and social studies teacher, for thirteen (13) continuous years, which employment has been regu'ar, full-time employment during the present school year and the twelve (12) school years immediately preceding this present year.

3. In addition to the normal expenses necessary to feed, clothe, and otherwise support himself and his three (3) minor children, your affiant also has to pay a babysitter on a weekly basis because he is a widower, and he also

has car payments to make and other loan re-payments to make. Your affiant, Rona'd Hammond, is wholly dependent on his salary to support himself and his children and to meet his financial obligations.

4. At about 12:00 noon on Monday, April 1, 1974, your affiant was served a notice by the Board of Education of Hortonville Joint School District No. 1, that it had scheduled a hearing to determine whether or not to discharge him, at 1:50 o'clock in the afternoon of Wednesday, April 3, 1974. This meeting was scheduled to last for twenty (20) minutes. Your affiant did not have an opportunity to consult with an attorney until Monday, April 1, 1974.

5. On Monday morning, April 1, 1974, your affiant appeared, together with his attorney, before the Board of Education of Hortonville Joint School District No. 1. At that time, he objected to the short notice that he had been given of the discharge hearing scheduled by the Board, and of his lack of opportunity to prepare any defense. This objection was dismissed by the Board. At the same time he also objected to the Board of Education sitting as the decision-maker in any hearing concerning his discharge, for the reason that the Board itself was involved as an adversary party in the very labor dispute that had generated the Board's action to discharge him. This objection too was dismissed by the Board. The request of your affiant to present evidence in his defense, and in mitigation of any conduct on his part that the Board might consider as a basis for terminating his employment, also was denied by the Board. Both of these objections and the request were dismissed by the Board, acting on the advice

of its attorney, James Ruhly, who also was acting as the "prosecuting" attorney against your affiant.

6. On April 4, 1974, your affiant received a letter from the Board of Education President Roger Weihing, which letter was notifying him that the Board had acted to terminate his employment with the Hortonville Joint School District No. 1. On April 4, 1974, promptly after receiving his letter of termination, the affiant, Ronald Hammond, filed a grievance with the Hortonville Joint School District No. 1, protesting the termination of his employment on the grounds that said termination of employment was without cause, in violation of the collective bargaining agreement which is in force between the Board of Education of Hortonville Joint School District No. 1, and their union, the Hortonville Education Association.

7. On information and belief, the Board of Education of Hortonville Joint School District No. 1, and their administrators and agents, intend to hire a teacher to replace your affiant on a permanent basis. If such a hiring is accomplished, your affiant and his three children will be caused irreparable harm. The job market for public school teachers at this time, and in particular at this time in the school year, virtually is non-existent.

8. This Affidavit is made in support of a motion that the Board of Education, and its administrators and agents, temporarily be enjoined from hiring any teachers to replace your affiant, or any other teachers similarly situated.

Dated this 4 day of April, 1974.

/s/ RONALD HAMMOND
Plaintiff

[Subscription omitted in printing]

EXHIBIT LIST
[Caption omitted in printing]
Judge Allen [sic] Deehr
Reporter James Kempfer
Hearing begun 4-9-74

PLAINTIFF'S EXHIBIT

Mkd for Identf	Offered in evid	Rec'd	Ref'd	With drawn	
√	√	√			#1—notice of discharge hearing
√	√	√			#2—letter of 4-2-74
√	√	√			#3—Grievance of Lichte
√	√	√			#4—Collective bargaining Contract
√	√		√		#5—2 page document signed by Mr. Obry
√	√	√			#6—1973-74 Contract
√	√	√			#7—Transcript
√	√	√			#8—Notice with Ctf. of Service
√	√	√			#9—Transcript 4-1-74
√	√	√			#10—Transcript 4-2-74
√	√	√			#11—document with options
√	√	√			#12—minutes
√	√				#13—resolution—Powers

[EXHIBIT # 1, APRIL 9, 1974]

HORTONVILLE COMMUNITY SCHOOLS
246 North Olk Street
Hortonville, Wis. 54944
March 29, 1974

Mr. Russel Lichte
2300 Woodrow Ct Apt. #1
Appleton, Wisconsin 54911

Dear Mr. Lichte:

The Board of Education for the Hortonville Commun-

ity Schools has been informed by Superintendent Obry that since March 18, 1974:

You have breached your individual employment contract;

You have engaged in an unlawful strike contrary to Wisconsin law.

This alleged conduct, if true, subjects you to disciplinary action by the Board, including termination of your employment contract.

You are hereby notified that the Board of Education has set a hearing on this matter for Tuesday, April 2, 1974, at 2:10 o'clock in the afternoon, or as soon thereafter as you may be heard, at the high school library, 246 North Olk Street, Hortonville.

At this hearing you will be given the opportunity to present any statement or evidence relevant to this alleged conduct.

Be further advised that after such hearing the Board will notify you in writing of what disciplinary action, if any, the Board has determined appropriate.

FOR THE BOARD OF EDUCATION:
/s/ Roger Weihing
Roger Weihing, President

Served this 30 day of March 1974 A.D.
/s/ Calvin L. Spice
Sheriff

By: /s/ Donald R. Plato
Deputy Sheriff

[EXHIBIT # 2, APRIL 9, 1974]

HORTONVILLE COMMUNITY SCHOOLS
246 North Olk Street
Hortonville, Wis. 54944

April 2, 1974

Mr. Russel Lichte
2300 Woodrow Ct, Apt. #1
Appleton, WI 54911

Dear Mr. Lichte:

Please be advised that the Board of Education met on April 2, 1974, and took the following action:

The Board found you guilty of the conduct set forth in Mr. Weihing's notice of March 29, 1974. Specifically, it found that since March 18, 1974:

You breached your individual employment contract;
You engaged in strike activity contrary to Wisconsin law.

The Board further found that these breaches of duty and law constitute good and sufficient cause for the immediate termination of your teaching contract.

Therefore, you are advised that your employment with the Hortonville Community Schools, Joint School District #1, Village of Hortonville, et al., is hereby terminated, effective immediately. Furthermore, this action includes the withdrawal of the offer of employment for the 1974-75 school term, and/or termination of such tendered employment contract. Be further advised that your district-paid WPS hospital insurance coverage will cease on April 30, 1974, unless you make contrary arrangements with the insurance company. Information regarding other fringe benefits will be forthcoming to you in the near future.

The Board also directed the administration to commence recruitment, both from within and outside the district, for professional staff for the balance of the 1973-74 school year and thereafter. You are invited to apply for any teaching position if you are interested in further employment in our district. You should contact Superintendent Obry or a principal if you wish to so apply.

FOR THE BOARD OF EDUCATION:
/s/ Roger Weihing
Roger Weihing, President

[EXHIBIT 3, APRIL 9, 1974]

GRIEVANCE

I, the undersigned teacher employed in the Hortonville Community Schools as a member of the Junior High-Elementary School faculty, under Mr. Riedl's supervision, hereby grieve the termination of my employment as noticed to me by Board of Education President Roger Weihing, by his letter to me dated April 2, 1974, on the grounds said action by the Board of Education was without just cause, in violation of the just cause requirement of the collective bargaining agreement in force between the Board and my Association. Remedy: employment.

April 4, 1974.

/s/ Russel E. Lichte

[EXHIBIT 4, APRIL 9, 1974]

Hortonville - 1972-73

PREAMBLE

In order to effectuate the provisions of Section 111.70 of the Wisconsin Statutes to encourage and increase effective and harmonious working relationships between the Board of Education of Hortonville Community Schools, being the Board of Education for Joint School District No. 1, of the Village of Hortonville, Wisconsin, (hereinafter referred to as the "Board"), and its professional employees represented by the Hortonville Education Association, (hereinafter referred to as the "Association"), and to enable the professional employees more fully to participate in and contribute to the development of policies on wages, hours, and conditions of employment.

This agreement is made and entered into on this day of ————, 19——, by and between the Board and the Association.

RECOGNITION

The Board recognizes the Association as the exclusive and sole bargaining representative for classroom teachers, librarians, and guidance counselors—excluding principals, assistant principals, supervisors, and administrators—whether under contract, on leave, employed or to be employed by the Board.

MANAGEMENT RIGHTS

The Board, on its own behalf, and on behalf of the electors of the District, hereby retains and reserves unto itself, without limitation, all powers, rights, authority, duties and

responsibilities conferred upon and vested in it by applicable law, rules and regulations to establish the framework of school policies and projects including, but without limitation because of enumeration, the right:

1. To the executive management and administrative control of the school system and its properties, programs and facilities, and the activities of its employees;
2. To employ and re-employ all personnel and, subject to the provisions of law or State Department of Public Instruction regulations, determine their qualifications and scope of employment, or their dismissal or demotion for just cause, their promotion and their work assignment;
3. To establish and supervise the program of instruction and to make the necessary assignments for all programs of an extra-curricular nature that, in the opinion of the Board, benefit students;
4. To determine means and methods of instruction, selection of textbooks and other teaching materials, the use of teaching aides, class schedules, and hours of instruction.

The exercise of the foregoing powers, rights, authority, duties and responsibilities by the Board, the adoption of policies, rules, regulations and practices in furtherance thereof, and the use of judgement and discretion in connection therewith shall be limited only by the specific and express terms of this agreement and Wisconsin Statutes; Section 111.70, and then only to the extent such specific and express terms hereof are in conformance with the Con-

stitution and Laws of the State of Wisconsin, and the Constitution and Laws of the United States. The Board shall encourage the use of administrative and teacher studies and recommendations in their deliberations and whenever possible consult with the parties affected.

NEGOTIATION PROCEDURE

On or about January 10, 1973, the Board agrees to meet and negotiate in good faith with the duly elected officers and/or committees of the Association on matters relating to wages, hours, and working conditions of employees from the before mentioned bargaining unit.

If an impasse occurs and persists, the parties shall determine whether mediation procedures shall be utilizied. If agreement on this matter is not forthcoming, the procedures of fact finding shall include a request to the Wisconsin Employment Relations Commission to provide the parties with a list of five or seven names from which the parties will select one as the fact finder. Parties initiating mediation or fact finding shall scratch first commissioner, and the scratching of other names will be done by alternating between the Board and the Association.

The Association recognizes the legal obligation of the Board to give to each teacher employed by it a written notice of renewal or refusal to renew his individual contract for the ensuing school year on or before March 15 of the school year during which said teacher holds a contract, pursuant to Section 118.22 (2) of the Wisconsin Statutes. In the event an agreement concerning wages, hours, and conditions of employment has not been reached by the parties by the date, said individual teacher contracts shall be governed by the terms of the latest Board proposal, and/or until a master agreement is reached.

This agreement may not be modified in whole or in part by the parties except by an agreement between the two parties.

GRIEVANCE PROCEDURE

A. Purpose - The purpose of this procedure is to provide an orderly method for resolving differences arising during the term of this agreement at the lowest possible administrative level. A determined effort shall be made to settle any such differences through the use of the grievance procedure, and there shall be no suspension of work or interference with the operations during the term of the agreement.

B. Definition - For the purpose of this agreement a grievance is defined as any complaint regarding the interpretation or application of a specific provision of this agreement.

C. Grievances shall be processed in accordance with the following procedures:

Step 1

a. An earnest effort shall first be made to settle the matter informally between the teacher(s) and his immediate supervisor.

b. If the matter is not resolved, the grievance shall be presented in writing by the teacher(s) to the immediate supervisor within five days after the facts upon which the grievance is based first occurred, or first became known. The immediate supervisor shall give his written answer within five days of the time the grievance was presented to him in writing.

Step 2

If not settled in Step 1, the grievance may within five days be appealed to the Superintendent of Schools. The Superintendent shall give a written answer no later than ten days after receipt of the appeal.

Step 3

If not settled in Step 2, the grievance may within ten days be appealed to the Board of Education. The Board shall give a written answer within thirty days after receipt of the appeal.

Step 4

In case of failure to agree in Step 3, the matter in dispute may be submitted on the petition of either party to the Wisconsin Employment Relations Commission to initiate advisory arbitration and to ask the WERC to submit a list of five or seven names from which an arbitrator will be selected. The initiator will scratch the first name and the scratching of other names will be done by alternating between the Board and the Association.

D. The parties agree to follow each of the foregoing steps in the processing of a grievance. If the employer fails to give a written answer within the time limits set out for any step, the employee(s) may immediately appeal to the next step. Grievances not processed to the next step within the prescribed time limits shall be considered dropped.

E. The written grievance shall give a clear and concise statement of the alleged grievance including the facts

upon which the grievance is based, the issue involved, the specific section(s) of the agreement alleged to have been violated, and the relief sought.

F. The employees representative may assist in processing the grievance at any step.

G. Saturdays, Sundays, and legal holidays shall be excluded in computing time limits under this article. It is important that grievances be processed as rapidly as possible and the number of days indicated at each level should be considered as a maximum and every effort should be made to expedite the process.

H. It shall be the option of the aggrieved to meet with the Superintendent or the Board during Step 2 or 3.

I. In the event a grievance is filed so that sufficient time as stipulated under all levels of the procedure cannot be provided before the last day of the school term, should it be necessary to puruse the grievance to all levels of the appeals, then said grievance shall be resolved in the new school term in September under the terms of this agreement and this article, unless mutually agreed upon to continue it during the recessed period.

Policy on Professional Growth

Because knowledge is expanding at a rapid rate and educational innovations exist, the professional growth of the teaching staff must be considered important.

The following policies are designed to promote that professional growth:

1. Those with less than the Bachelor's Degree shall be

required to earn a minimum of eight credits at an accredited degree-granting institution of higher learning every three years, or when it becomes necessary to obtain a teaching license.

2. Teachers with a Bachelor's Degree shall earn a minimum of five credits every five years, dated from September, 1964, or from their starting date of employment, whichever is later. However, if a teacher wishes to qualify for the 4½ year training level, he or she must have 15 semester hours at graduate level.

3. Teachers with a Master's Degree shall earn a minimum of five credits every seven years, dated from September, 1969, or from the date of earning their Master's Degree, or from the starting date of employment, whichever is later. However, if a teacher wishes to qualify for the 5½ year training level, he or she must have 15 semester hours at graduate level in their major teaching field, but not necessarily that they apply toward a doctoral degree.

4. Credits earned in one interval shall not count in another interval.

5. These requirements shall hold until the time interval in which the educator reaches the age of fifty-five.

6. Educators desiring Board credit from other accredited degree-granting institutions must apply for permission from the Board of Education prior to starting the activity. Board credit shall apply toward policy on professional growth, but will not apply to item "e" under Appendix "A".

7. Persons who fail to comply with the regulations will remain at the contract salary under which they are hired following the time interval, until such time that they fulfill the requirements. Placement on the salary schedule after the requirement is fulfilled shall be at the step following the step at which the teacher last met the requirement.

Leave Policies

Sick Leave

a. All teachers of Jt. School District #1 of the Village of Hortonville, et al, shall be entitled to eight (8) days of sick leave per year without deduction of pay upon presentation of evidence of illness by a reputable physician, if such evidence be deemed necessary by the Superintendent.

b. The unused days each year shall be allowed to accumulate up to eighty-five (85) days, and are to be available for qualified extended leave with no deduction of pay for the employee (40.17) (7).

c. Sick leave shall be interpreted to apply to absences because of personal illness or physical incapacity of the employee himself, to absences because of serious illness within the immediate family of the employee, or to absences occasioned by death within the immediate family of the employee. (Immediate family is to be defined as parent, husband or wife, brother or sister, child, grandparent, father-in-law, mother-in-law, aunt, uncle, sister-in-law or brother-in-law.)

d. In making deduction for excused absences not covered by sick leave, the deduction shall be 1/190 of the teacher's contract for each day absent. The deduction shall be made irrespective of whether it is possible to employ a substitute or not.

e. Employees absent under leave provisions and benefits will be fully responsible for the immediate lesson plans, class lists, class books and seating charts. Failure to provide these may be cause for voiding the sick leave benefits.

f. When a teacher is excluded from school because of quarantine and/or non-provoked assault imposed as a result of contract brought about in the line of duty, such teacher will be entitled to full pay without loss of accumulated sick leave.

Emergency Leave

One day of emergency leave may be granted each year, which is not cumulative. Deducted from the day's salary will be the present substitutes pay schedule. Item "e" under sick leave is also in effect. This leave shall be used only in situations of urgency for the purpose of conducting those affairs which are impossible to transact after school hours or during weekends.

Educational Leave

Teachers granted a leave of absence to complete an advanced degree shall be eligible to receive $25.00 per credit up to a maximum of $400.00 to be paid in installments of $200.00 at the end of the first semester of the first two years, upon returning to the school system.

Professional Leave

Instructors may, with the approval of the Superintendent, and concurrence of the Board, attend professional conferences, workshops, institutes and other meetings not scheduled in the school calendar.

The Board shall reimburse instructors for all reasonable expenses incurred: i.e., transporation, lodging, meals, and registration or other fees while on approved professional leave.

When it is evident that attendance or observation of an activity in another school building or school system will contribute to the effectiveness of the instructional program, the Superintendent, with reasonable limitations as to time and number of individuals involved, may grant permission to observe an activity in another school building or school system to instructors without loss of pay.

The Association recognizes and supports a program of surveillance and disciplinary action in any cases involving misuse of leave benefits.

All benefits occurring under these leave policies will automatically expire at the effective resignation date or termination of employment of any employee.

Working Conditions

Experience Allowed

Candidates with teaching experience elsewhere may be hired at full credit or the administrative staff may place the candidate at a lower than actual experience level

with the understanding such candidate shall be on schedule the third contract.

Use of Teachers as Substitutes

An attempt will be made to employ substitute teachers for a 1/2 or full day basis and a study will be conducted to determine the number of times teachers are called upon to substitute for special one hour periods.

Part Time Teacher Policy

Teachers hired for less than full time shall be allowed the experience factor on the salary schedule identical to their actual teaching time the previous year.

Work Day

Regular building hours for teachers shall be eight (8) per day, including a duty free lunch period of at least thirty minutes. The starting and dismissal times which may vary, shall be determined by the District. The above statement to be in effect for the duration of the 1972-1973 contract. It shall then be renegotiated or reverted back to the 1971-1972 contract.

Assignments

Should a change in the teaching assignment from the previous year become necessary for a particular teacher, an attempt will be made to notify the teacher at least 30 days before the fall opening of school.

Various club and class advisors shall be assigned by the administration and these tasks shall be without compensation.

Assistance in Assault Cases

The Board will aid the teacher in situations as provided under Wisconsin Statute 270.58.

Work Load

It is agreed to pay in addition to regular salary, an hourly wage rate equal to 1/1330 of regular salary to any junior or senior high school teacher who has been scheduled an extra class assignment or a teaching work load without a planning period per day on a regular basis.

Dues Check-Off

Payment of Teachers dues and fees to Professional Organizations shall be deducted from teachers salary through a check-off system to be agreed upon.

Professional Obligation

There are certain professional obligations to students, parents, and school which are shared by all teachers, including faculty meetings, conventions, school public relations programs, etc. These obligations are to be met by all teachers without compensation. Failure to meet such professional obligations or to attend conventions will result in loss of pay for days missed.

Instructor Evaluation

All monitoring or observation of the work performance of an instructor shall be conducted openly and with his full knowledge. The use of audio systems, or similar surveillance devices shall be strictly prohibited. Evaluation reports shall be made known to the instructor.

An legitimate complaints regarding an instructor made to the Administration by any parent, student or other person shall be promptly and privately called to such instructor's attention.

Faculty Lounge

The Board shall continue to make available in each school building a room or rooms that are appropriately furnished for use as a faculty lounge containing toilet facilities.

Association Use of School Facilities

The Association shall be allowed to use school facilities for Association business providing such usage does not interfere with the educational program.

Non-Renewal of Contract

A teacher whose contract is not to be renewed for the following school year shall be notified as required by law. The teacher shall be informed of the reasons for his dismissal, in writing, and shall have the right to request a hearing by the Board of Education. Such request must be made in writing within five days after receipt of the notice of dismissal. Teachers whose work is not satisfactory to the administration and Board of Education may not receive an annual increment.

Resignations

Thirty (30) days written notice prior to the effective date of the resignation must be given and mutually accepted by both parties. If the Board is unable to find a satisfactory replacement, no release will be granted. Under

extenuating circumstances, the Superintendent may waive such notice.

A teacher who becomes pregnant shall be required to resign at the end of the fourth month of pregnancy or the beginning of the semester if the periods generally coincide. Depending upon health, doctor certification, and job requirements, the Board may make adjustments to this period based upon the recommendations of the Superintendent.

Retirement

Teachers are to be retired at 65 years of age except that the Board of Education may use their discretion on extension.

Savings Clause

Shall any portion of this contract be invalidated by legislation or court decisions, the remainder the contract will be effective, and the parts affected will coincide with the new law.

School Calendar

The school calendar shall annually be set up by the Board and referred to the Association for its review and recommendation. The calendar shall then be set by the Board of Education.

Salary Schedule and Extra Duty Pay

Appendix "A"

Duration

The provisions of this Agreement will be effective as of the ———— day of ————, 19—, and shall continue and remain in full force and effect as binding on the parties until the ——— day of ———— 19—. This Agreement shall not be extended orally and it is expressly understood that it shall expire on the date indicated.

Education Association	Board of Education
By: ———— President	By: ———— President
By: ———— Secretary	By: ———— Secretary

(APPENDIX "A")

Salary Schedule

1972 - 1973

Teachers working more than the normal school year shall be paid for this extra time at a rate set by the Board of Education. All other salaries shall be based on the schedule except that in cases of emergency the Board may hire above the schedule with the stipulation that the teacher be on schedule in two years.

Following is the basic schedule:

	1	2	3	4	5	6	7	8	9	10	11	12	13	14
3	6450	6643+	6837	7224	7611	7998	8385							
4	7350	7570+	7791	8232	8673	9114	9555	9996	10216+	10437	10657+	10878	11098+	11319
4½	7600	7828	8056	8512	8968	9424	9880	10336	10564	10792	11020	11248	11476	11704
5	7850	8085+	8321	8792	9263	9734	10205	10676	10911+	11147	11382+	11618	11853+	12089
5½	8100	8343	8586	9072	9558	10044	10530	11016	11259	11502	11745	11988	12231	12474

The following shall be added to the above basic schedule:

Head Basketball Coach . . .	$600.00	Musical (split-drama and choral).	$100.00
Assistant Basketball Coach.	333.00	One Act Plays	67.00
Head Football Coach	600.00	Senior Class Play	67.00
Assistant Football Coach. .	333.00	Outside Band Activities	266.00
Head Baseball Coach	333.00	Forensics Head Coach.	133.00
Head Wrestling Coach . . .	600.00	Forensics Assistant Coach	100.00
Assistant Wrestling Coach .	333.00	Annual.	200.00
Head Track Coach.	333.00	Assistant Annual Director	100.00
Assistant Track Coach . . .	200.00	Newspaper	200.00
Head Cross Country Coach. .	333.00	High School G.A.A.	350.00
Junior High Coaches	266.00	Jr. High School G.A.A.	67.00
Department Head and Multi-			
Unit Leader -- 1st year	150.00	Teachers employed for periods longer than	
-- 2nd year	225.00	the regular school year shall be paid at	
-- 3rd year	300.00	a rate of $135.00 per week.	

+ means 50¢

Miscellaneous Schedule

a. The Board of Education will pay 80% of major medical insurance plan of Wisconsin Physicians Service with a $40.00 per day hospital room, oral surgery, and ambulance service.

b. Necessary travel in connection with any teaching position shall be reimbursed at the rate of ten cents (10¢) per mile upon a detailed itemized statement submitted by the teacher and approved by the administration.

c. Salaries will be paid in twenty-four (24) installments on the fifteenth (15th) and thirtieth (30th) of each month during the school year and once each month during June, July and August.

d. An increase of salary due to obtaining the bachelor's or master's degree or any step before, between, or after, shall take place at the beginning of the next fall term (September). The teacher shall advance one step from their present experience level.

e. Reimbursement of credits earned will be paid at a rate of $35.00 per credit to a maximum of $175.00 every five years for B.S. degree teachers and every seven years for M.S. degree teachers.

f. Board shall pay the following to the State Teachers Retirement Fund:

$125.00 - Those teachers on the 14th step or below.
$250.00 - Those teachers above the 14th step.

g. All teachers will be expected to perform five (5) extra duties without pay as part of their regular salary. Any duties beyond five for the year will be paid for according to the schedule below.

Extra Duty Pay Schedule as follows:

All supervisors at basketball and wrestling events	$10.00
All bus chaperones	$10.00
Chaperones at dances following another event	$ 5.00
Chaperones at dances not following another event	$10 00
Football ticket sellers, downbox man, football PA announcer, timers at football, basketball and wrestling, scorer at basketball and wrestling, statistician at football games and all chaperones for plays, musicals, concerts, etc.	$ 7.50
Individuals helping at track meets	$ 5.00
Scouting in a sport other than the sport the man is coaching. (Limit: Football-6, Basketball-12)	$10.00

All 7th through 12th teachers will be assigned athletic meet responsibilities. Other activities assignments at Jr. & Sr. High levels will be made at Jr. and Senior High levels respectively.

h. All duties performed on NON-SCHOOL days shall be paid at the rate of $2.25 per hour in addition to the above schedule.

[EXHIBIT # 6, APRIL 9, 1974]

BOARD OF EDUCATION
Joint School Ditrict #1, Village of Hortonville, et al.
Hortonville, Wisconsin

CONTRACT

On the 12th day of March, 1973, the Board of Education of Joint School District No. 1, hereinafter designated School Board, of the Village of Hortonville, et. al., State of Wisconsin, by resolution, hereby contracts with Thomas Nadeau, hereinafter designated Teacher, a professionally trained educator legally qualified in the State of Wisconsin.

The terms of said contract will commence on or about the ———— day of ————, 19—, which includes 190 contract days, of which 180 are teaching days.

For such services rendered, the said School Board is to pay to said Teacher the sum of $11,382.50 in 24 installments, payable on the 15th and 30th day of each month.

It is Further Agreed, that this contract incorporates herein by reference, to have the same effect as if made a part thereof of the last collective bargaining agreement entered into by and between the Hortonville Education Association, and said School Board, dated May 8, 1972, and is subject to all terms and conditions of such collective bargaining agreement. This contract is also subject to all policies, rules or regulations of said School Board now existing not inconsistent or in conflict with said collective bargaining agreement.

The parties understand and agree that this is a solemn, binding contract not to be breached by either party without good and sufficient grounds. The contract may be ter-

minated before the end of the term by mutual agreement of both parties.

This contract is not valid unless returned on or before April 15, 1973.

Dated this 12th day of March, 1973.

Hortonville, Wisconsin
BOARD OF EDUCATION
BY:
/s/ Roger Weihing
/s/ Robert Hauk
/s/ Merlin Plamann
/s/ Victor Schroth
/s/ Ronald C. Suprise
/s/ Floyd Meyer
/s/ Sherman J. Waite

I hereby accept the provisions as set forth in this contract:

/s/ Thomas E. Nadeau
R # 1
Hortonville, Wis.

By signing this contract, I attest that I am not under contract to any other school district.

————

[EXHIBIT # 7, APRIL 1974]

HEARING re: Striking Teachers, held before the Hortonville School Board, Monday, April 1, 1974, at 9:00 o'clock a.m.

APPEARANCES: LATHROP & BRAITHWAITE,
148 E. Main Street,
Hortonville, Wisconsin
By James Ruhly, appearing for the School Board

DONALD DICKINSON, Organizational Specialist,
2601 West College Avenue,
Appleton, Wisconsin,
representative of Wisconsin Educational Association Council,
222 West Washington Avenue,
Madison, Wisconsin 53703
by Bruce F. Ehlke, Esq.,
Lawton & Cates,
110 East Main Street,
Madison, Wisconsin 53703

Members of School Board:

Roger Weihing, President
Robert Hauk, Clerk
Floyd Meyer, Vice-President
Jean Meads, Board Member
Merlin Plamann, Treasurer
Victor Schroth, Board Member
Ronald Suprise, Board Member.

MR. WEIHING: Counsel, will you proceed.

MR. RUHLY: The Board of Education has asked me to read the following rules governing the conduct of todays proceedings:

1. Smoking of any sort is prohibited in the building.
2. Silence is requested unless request to speak is granted.
3. No picture-taking is permitted in this meeting room.
4. Only the door furthest from where the members are situated will be used, except in case of emergency, when this door will be available.
5. The lavatory nearest this room is available for our use. The Ladies room is out here, and the Mens room is in the main office.
6. Persons not respecting these rules will be expected to leave the premises immediately.

Is John Amburgy present?

MR. DONALD DICKINSON: I am Don Dickinson. Mr. Amburgy is to be represented by Mr. Bruce F. Ehlke, who has not yet arrived.

MR. RUHLY: Mr. Dickinson, do you know when Mr. Ehlke will be arriving?

MR. DICKINSON: No, not exactly. I expect him at any time.

MR. RUHLY: Before proceeding, we requested Mr. Amburgy who represents the Board as their private attorney, to appear.

MR. DICKINSON: I am waiting for Mr. Ehlke to appear.

MR. RUHLY: Was Mr. Ehlke aware of the hearing beginning at 9:00 o'clock, Mr. Dickinson?

MR. DICKINSON: Did you have conversation with Mr. Ehlke previously?

MR. RUHLY: I am asking you.

MR. DICKINSON: I don't know.

MR. RUHLY: Ladies and Gentlemen of the Board, I am going to suggest that we continue this hearing for nine minutes, in the hopes Mr. Ehlke will at that time be present.

Mr. President, do you wish to take a vote, or will we adjourn the hearing until 9:15?

MR. WEIHING: At this time we will adjourn the hearing to 9:15.

9:16 a.m. - MR. RUHLE: I would like the record to reflect at this point, all of the Board Members are present. Also present is MARVIN OBRY, Superintendent.

Mr. Dickinson, do you know where Mr. Ehlke is staying, so we can call him?

MR. DICKINSON: We have just sent someone out to call him.

MR. RUHLE: Is JAMES OLSON present? Do you represent Mr. Olson?

MR. DICKINSON: Yes.

MR. RUHLE: Does the same position stand with respect to Mr. Olson?

MR. DICKINSON: Yes.

MR. RUHLE: Let the record show it is 9:18, that Mr. Beryl Watson informs me he just spoke with Mr. Ehlke who is just leaving Appleton at this time.

Mr. President, this puts us in a difficult position with scheduling. However, I think it important that individuals involved have representatives of their choosing.

The only further question I have at this point, before I make recommendation to the Board, is that I would like Mr. Amburgy to indicate for the record whether the request made of Mr. Dickinson is as representative on his behalf.

MR. DICKINSON: Mr. Amburgy will answer through counsel.

MR. RUHLE: Mr. Amburgy refuses at this point to respond to my question?

MR. DICKINSON: Mr. Amburgy has empowered me, in the absence of Mr. Ehlke, to speak to and for him, and the teacher will wait until his counsel is available.

MR. RUHLE: Does that hold true for Mr. Olson also?

MR. DICKINSON: It does.

MR. RUHLE: Mr. President, in view of the report with respect to Mr. Ehlke just leaving Appleton, and in view of the fact it is approximately a fifteen-minute drive from Appleton, I would recommend that the Board further adjourn this hearing until 9:35 a.m., while we await Mr. Ehlke's arrival.

MR. WEIHING: Is there any objection from the Board members? (none) We will adjorn this hearing until 9:45 a.m.

MR. RUHLE: Mr. President, it is 9:35. Can the record show whether Mr. Ehlke has appeared yet? Mr. Dickinson, is Mr. Ehlke here?

MR. DICKINSON: No, he is not.

MR. RUHLE: Mr. President, it is 9:40. Is Mr. Russell Hildebrand here? (Yes).

Does Mr. Dickinson represent Mr. Hildebrand?

MR. DICKINSON: Yes, I do.

MR. RUHLE: Would Mr. Hildebrand like to proceed?

MR. DICKINSON: Mr. Hildebrand will await counsel.

MR. RUHLE: The same position as previously stated?

MR. DICKINSON: Yes.

MR. RUHLE: Mr. President, I would ask that the record reflects it is 9:45 a.m., and we are still waiting for Mr. Ehlke.

Let the record show it is 9:46½ a.m., and Mr. Ehlke has just arrived.

Mr. Ehlke, we would like to proceed, if we may.

MR. EHLKE: One problem I have, as I explained to Mr. Dickinson, the shortness of time between the Notice of these hearings which you have scheduled for this morning, have placed somewhat of a burden on me, in order to be able to talk to these people.

MR. RUHLE: May I proceed?

MR. EHLKE: What are we proceeding on?

MR. RUHLE: I would like the record to reflect procedural matters.

MR. EHLKE: Then I would like to speak to Mr. Amburgy. He has contacted me by letter and I haven't even had a chance to speak to him. Are you going to deny me that?

MR. RUHLE: I will permit you to make any statement you wish. You have to'd us Mr. Amburgy has written you asking you to represent him?

MR. EHLKE: I would like to have a chance to speak to Mr. Amburgy.

MR. RUHLE: Are you prepared to advise us whether Mr. Amburgy wants a hearing?

MR. EHLKE: I don't know.

MR. RUHLE: You aren't prepared to let us know that?

MR. EHLKE: I don't know, I haven't talked to the man.

MR. RUHLE: Would you speak to the man with the question whether he wishes a public or private hearing? We have held the meeting up for approximately 45 minutes, and we would like to be advised how you wish to proceed.

MR. EHLKE: As I told you on the phone yesterday, this matter has been going on for two weeks, and I don't take it lightly at all that these people should be served with a Notice two days ago. I would like to talk to Mr. Amburgy.

MR. RUHLE: All right. It's 9:50 and Mr. Ehlke is going to speak to his client.

MR. EHLKE: I would like to speak with a number of people. We could retire from this room.

MR. RUHLE: Whatever you are requesting. If you would like to have five minutes or more, we would leave the room, if it would be more convenient for you.

MR. EHLKE: It would be more convenient for me.

MR. RUHLE: I understand you will address the questions to a public nature and you can address yourself to us. We will be checking back in at 10:00 o'clock, Mr. Ehlke.

(10:10 o'clock am.)

MR. RUHLE: Miss Reporter, will you note that it is now 10:07 and we have returned to the room. Mr. Ehlke, I read an opening sentence earlier, in your absence. I would like to re-read that into the record.

"The purpose of this hearing is to ascertain the relevant facts regarding recent alleged conduct by ————. Before proceeding, we request that counsel please advise the Board if a private hearing is requested in this matter."

Are you prepared to report to that, Mr. Ehlke?

MR. EHLKE: Yes. On behalf of Mr. Amburgy and all the teachers in this room, they have received a Notice which says that the Board of Education has been informed by Superintendent Obry, that since March 18th of 1974, you have breached your employment contract and engaged in unlawful strike. Each person got the same notice, except some of them had white backing and some had blue backing. Now there are other teachers outside that did not receive a notice of such a hearing. As far as all the teachers who received notice of the hearing goes, they want to have an open meeting. That includes Mr. Amburgy, of course. Furthermore, inasmuch as everybody has been charged with the same thing, this meeting should apply to all of them, not just Mr. Amburgy.

MR. RUHLE: We are concerned as I said, at this time, with Mr. Amburgy, and it is true that identical notices with this specific data as to time of hearing, were sent to most of the teachers in the District.

Now with respect to Mr. Amburgy, I would like the record to reflect that in answer to the statement made by me earlier, Mr. Amburgy is not requesting a private hearing. Specifically this hearing is concerned with whether Mr. Amburgy breached his individual employment contract, engaged in unlawful strike contrary to Wisconsin law. Mr. Amburgy was advised of this hearing and the allegations in a notice signed by Board President Weihing at the Board's direction on March 29, 1974, and served on March 29th, 1974 as shown by Proof of Service.

After the Board has had the evidence relevant to the allegations, the Board will determine whether Mr. Amburgy is guilty of the alleged conduct. If the Board finds he is guilty, it will consider what discipline, if any, is appropriate under the circumstances.

The Board has requested me to conduct this hearing and elicit evidence relevant to the allegations enumerated. My name is James Ruhly.

Would Mr. Amburgy or his counsel please state the appearances on Mr. Amburgy's behalf at this time?

Mr. Ehlke, I understand your previous position. I would like the record to reflect who is appearing at this time for Mr. Amburgy.

MR. EHLKE: My name is Bruce F. Ehlke, of the firm of Lawton & Cates, and I am representing all individual teachers in this room who are appearing pursuant to this Notice from the Board of Education which is dated March 29th.

At this time I feel it is only fair that I advise the Board what I advised Mr. Ruhle of yesterday. That is, if you are going to hold hearings on discharge, it has to be a hearing that meets constitutionary due process of law. That means an individual or individuals on the line have to be given fair notice of the charges against them and fair chances also to defend themselves against those charges, and that means opportunity to contact a lawyer if that is appropriate under the circumstances. And it is, in this case, because Mr. Ruhle is sitting there for the Board, he is acting as the Board's spokesman. You have to give them a fair chance to prepare their defense and furthermore, the individual or individuals have the right that they only be tried before a Judge or Tribunal that is fair and impar-

tial in the situation at hand. It certainly, I don't think, can be held that the Board of Education is appearing as an impartial tribunal when you consider what we are talking about—a labor dispute and the Board is employer, and you are talking of punishing folks because of this dispute.

Second, we want a fair and impartial tribunal.

I do understand correctly, Mr. Ruhle, do I not, that you are hired and retained by the Board of Education in this matter?

MR. RUHLE: Correct.

MR. EHLKE: And I understand Mr. Braithwaite is also present in the room today?

MR. RUHLE: Correct.

MR. EHLKE: Who also was hired and retained by the Board of Education?

MR. RUHLE: Correct.

MR. WEIHING: I am asking the men with cameras to leave the room. If they wish to come back in without cameras, they can do so.

MR. EHLKE: I guess what I'm telling you is that we have a very serious problem to the Boards proceeding in this matter under the circumstances here. I have a couple other questions too. Assuming that if we are just here to sit and talk and not sitting here to judge anybody which would be the other alternative—have the proper notices gone out. Is this properly called the School Board meeting?

MR. WEIHING: We are here not to just talk, we are here to consider the matters set forth on the notices served on the teachers.

MR. EHLKE: I would like an answer to my question.

MR. RUHLE: I am not giving you an answer to the question.

MR. EHLKE: Then we have a question of whether you are sitting as Judge here, or having a meeting with you?

MR. WEIHING: We are conducting a hearing to determine the answers to the questions.

MR. EHLKE: Mr. Ruhle gave me a tentative answer and that is, these notices prior to their being sent out to individual employees, was this noticed to the Union or is this a unilateral notice to employees represented by the Union?

Mr. Wisniewski, you are President of the Union?

MR. WISNIEWSKI: Yes.

MR. EHLKE: Did the Board give you notification of this matter?

MR. WISNIEWSKI: None whatsoever.

MR. EHLKE: What were the means by which you learned of this action against the employees, individuals you represent?

MR. WISNIEWSKI: Some of the teachers bringing in letters.

MR. EHLKE: So you got notice through the individuals?

MR. WISNIEWSKI: Right.

MR. EHLKE: I don't know what you folks are trying to do here, but it seems to me that you have to know and understand that you are in a labor relations setting; that your obligation in that setting is to deal with the representatives of the employees and to at least keep that representative advised of actions you might take against individuals represented by this organization. Furthermore, it seems to me you have scheduled three days of so-called hearings in a matter concerning your present labor dispute with the organization and the employees it represents,

and you have done this at a time, as I understand it, when you find it difficult to sit down and bargain with the Union and settle your dispute. In every one of this kind of dispute I have been involved in, whether it be city employees in Superior, Tennessee or Kentucky, wherever, the only place you are going to settle this with your employees is to meet at the bargain table, and a meeting like this is a waste of time and you will not reach agreement under that kind of action. There are problems. Somehow you are going to accomplish your initiative even by permitting people to parade out in front. There is serious question of the lawfulness of the Board sitting at this time, in arriving at this labor dispute. These are questions that are raised because the Constitution of the United States tells us that a man is going to lose his job—and that's what I understand you are talking about—these notices. He is entitled to a hearing before a neutral body, and we certainly don't have that here, because these are your employees and your dispute concerns a difference between the two of you. It's sort of like asking me to sit as a Judge in a dispute between myself and my former wife—and I'll tell you that was a simpler matter and resolved in a simpler manner than this thing.

We also have a problem that the Board didn't even notify the Union of this action. So what's wrong with sitting down and bargaining? That's where you're going to settle the dispute. You can be as angry as all get out and have all kinds of principles about work action that is involved here, but that isn't going to solve your differences.

Now if you insist on having a hearing today, and you think that's somehow going to accomplish something, all right, but it's going to be a hearing that all of these people are tried as a group.

May I have a ruling, Mr. Speaker?

MR. RUHLE: I am not speaking.

MR. EHLKE: Incidentally, when were you retained?

MR. RUHLE: Friday.

MR. EHLKE: And suddenly we have to have a hearing on Monday?

MR. RUHLE: Mr. Ehlke, the procedures utilized by the Board are not the issue here. You have stated your objections, you will have your opportunity to argue on them. The Board at this time is not going to make judgment on the questions you have raised, unless you have something specific you want to ask us with reference to the proceeding here.

MR. EHLKE: I am asking you to respond right now in relation to what I said.

MR. RUHLE: What are you asking us to do?

MR. EHLKE: Meet and bargain.

MR. RUHLE: This hearing wasn't designed for the purpose of considering that question. Let me ask you this. You have had opportunity to speak with your clients?

MR. EHLKE: This meeting can be whatever you want it to be.

MR. RUHLE: And the board has set this meeting to hear, to determine whether certain allegations are true. That's the purpose of the meeting, sir.

MR. EHLKE: That's the alleged purpose of the meeting, and that's what you said. What I bring before you is a fact, the only way to solve these peoples' dispute is to meet and bargain. And I put that on the table.

MR. RUHLE: After that, the Board will consider that. You have indicated you have not had specific time to prepare. Will you make that more specific?

MR. EHLKE: Why are some people here this morning with white and blue backed notices, and others have not?

MR. RUHLE: Mr. Ehlke, if you have objection to the way the Board has served notices, you are free to so state.

MR. EHLKE: It is your contention to serve one of these things on each individual employee of the district?

MR. RUHLE: That is not true.

MR. EHLKE: There are some that aren't going to be here?

MR. RUHLE: That's right.

MR. EHLKE: And what are the reasons?

MR. RUHLE: That, it seems to me, isn't the present issue. I am not going to digress this meeting to examination of what the Board has done. The teachers have all struck in vio'ation of hours and violation of their employment contract. We would like to have whatever is relevant to that.

MR. EHLKE: And I suggest we meet and bargain.

MR. RUHLE: The parties are in mediation but we aren't going to abandon the hearings because you have made another suggestion. Are you preparing to meet with Mr. Amburgy.

MR. EHLKE: Are any other meetings scheduled?

MR. RUHLE: There are none scheduled. That isn't the issue, Mr. Ehlke. Are you prepared to proceed with Mr. Amburgy?

MR. EHLKE: We can't bargain because there is mediation pending.

MR. RUHLE: Mr. Ehlke, are you prepared to proceed with Mr. Amburgy, Mr. Olson and Mr. Hildebrand?

MR. EHLKE: And all the other teachers?

MR. RUHLE: I would want to discuss with the Board

the implications of proceeding on the basis of all teachers that have thus far been served, in one hearing. I am not prepared to tell you whether we can proceed on that basis. I would also like to speak with you prior to making a decision on that.

MR. EHLKE: Well, it seems to me, Jim, it's your meeting. You will have to make the decision what you will want to do with your time. Do you want us to step out while you talk to the Board?

MR. RUHLE: No, that won't be necessary. We will step out if you need to caucus, Mr. Ehlke. Let me ask you again, are you prepared to proceed with Mr. Amburgy—having a hearing with Mr. Amburgy?

MR. EHLKE: First, we aren't going to have a hearing with just Mr. Amburgy. Second, I'm as prepared relative to Mr. Amburgy as other people who have received one of these things.

MR. RUHLE: These 'things', indicating Notices.

MR. EHLKE: The third thing is, it is your meeting, Jim, and I'm not sure exactly if the Boards' position is where it won't bargain, but wants to spend three days in some kind of proceeding which is meaningless as far as settling the dispute. I don't know what your intentions are on how you would proceed, so to that extent I don't know what kind of preparation would be required. I just would have to see what your contentions are before I could really answer you, give you a realistic answer as to what further preparation we might need. We have some preparation, and it is our position that in part the present work dispute is just between management people and the Board of Education are employers—it is resolved of conduct on the part of management and that would become a matter

of issue and we would put in evidence in that regard. Other than that, you will have to tell us what your thoughts are and what you want to do.

May I have a few minutes, Mr. Chairman?

MR. WEIHING: Sure.

MR. EHLKE: As I said before, Jim, everybody is here now. You have the full Board for the first time in weeks, at least meeting with all these people and employees. The problem is the Collective Bargaining Agreement, and that's where some agreement has to be reached. What's wrong with bargaining right now?

We have our lawyer here, we're just wasting time. Can't you get back to the table? You have parents here and kids throughout the whole place.

You bargain for three days and you're going to have an agreement. You screw around with this for three days and you'll have nothing. Can't we get this thing settled?

MR. RUHLE: Is Mr. Ambургy here? If so, I would like to ask him a few questions.

MR. EHLKE: This is a labor dispute, Mr. Ruhle, and you should know you are putting yourself in a position, and this is what I was kind of afraid of—you're going to call individual employees and interrogate them as to their position and that is unlawful. I am going to instruct all my clients to refuse to answer any questions posed by you in this matter. If you have any questions, you ask the Union, not the individuals. It's clear you are trying to circumvent when you start to ask individuals. If you have any questions, pose them to the Union.

MR. RUHLE: Mr. Ehlke, I have a limited number of questions I would like to ask Mr. Ambургy.

MR. EHLKE: I am sure you do.

MR. RUHLE: And I would request that Mr. Ambургy be permitted to answer those questions.

MR. EHLKE: No.

MR. RUHLE: Does the same hold true of Mr. Olson—please don't interrupt me. I have, I think, attempted not to interrupt you, and I will appreciate your not interrupting me. Is Mr. Olson prepared to answer questions I would like to ask him?

MR. EHLKE: Mr. Ruhle, you by-passed the Union when you noticed this matter: you refused to meet and bargain with them, and now you are planning to ask each individual employee questions regarding this major dispute? You should know better than that, Mr. Ruhle.

MR. RUHLE: Mr. Ehlke, you aren't refusing to meet and bargain. It would appear to me you are advising your clients not to answer.

MR. EHLKE: Because it's unlawful for counsel for the employer to interrogate and question employees regarding a labor dispute.

MR. RUHLE: Counsel's categorization of the questions I wish to ask is not accurate. Let the record further note, Mr. Ehlke, that you have available forum in which to present any claims you want to present with respect to whether what the board is doing is lawful or unlawful.

MR. EHLKE: That won't dissolve the dispute that is dividing these people right now. The way to dissolve the dispute right now is to bargain.

MR. RUHLE: Is Mr. Hildebrand here?

MR. EHLKE: Yes.

MR. RUHLE: I would like the record to show who is here and who might not be. Is Mr. Jeffers here?

MR. EHLKE: Yes.

MR. RUHLE: Is Mr. Hildebrand prepared to answer questions?

MR. EHLKE: This answer is the same, because it is highly improper and unlawful for you to interrogate employees.

MR. RUHLE: I appreciate your stating it for the nineteenth time.

MR. EHLKE: I told you you are going to get the same answer in each case.

MR. RUHLE: They will not answer the questions the Board would like to ask—is that your position?

MR. EHLKE: No, because it is improper, Mr. Ruhle. This is a dispute.

MR. RUHLE: Mr. Jeffers' hearing was set for 10:00; Mr. Johnson's for 10:20. Is Mr. Johnson present?

MR. EHLKE: Yes.

MR. RUHLE: And Mr. Kreul's hearing was set for 10:40. Is Mr. Kruel present?

MR. EHLKE: Yes.

MR. RUHLE: I take it that counsel is directing those employees not to answer questions that I might want to ask them, going to the purpose of this hearing?

MR. EHLKE: Yes, for the same reasons I have already given you—harrassment and interrogation is unlawful.

MR. RUHLE: Mr. Ehler, I want the record to reflect the Board strongly disagrees that the questions, or the purpose for the questions we intend to ask, or the purpose of this hearing, are unlawful. I think you should be advised of that. Mr. Ehlke, perhaps—

MR. EHLKE. There is no sense in litigating the question of interference, coercion of employees acting collectively. I don't understand. Mr. Ruhle, what you have against bargaining.

MR. RUHLE: We have nothing against bargaining. This Board has never refused to bargain and it does not so refuse now. But we aren't prepared to bargain because we have other matters scheduled.

MR. EHLKE: Would you like to take another break? As I understand, Mr. Ruhle, you are not only acting as counsel in this case, but do I understand your firm also represents bargaining?

MR. RUHLE: I have not been retained to bargain.

MR. EHLKE: The Chief spokesman for the Board then, is Mr. Weihing?

MR. RUHLE: The chief spokesman for the Board is Mr. Brown and is including Mr. Braithwaite. We are not going to adjourn this meeting for the purpose of negotiation. We have schedules here. We would like to know if your people are going to cooperate in these hearings.

MR. EHLER: What is the purpose of hearings?

MR. RUHLE: The notice was served on each teacher, it could not be more succinctly stated. We have three more people scheduled for hearings this morning.

MR. EHLKE: Who are they?

MR. RUHLE: Miss Rosemarie Lauer. Is she present?

MR. EHLKE: Yes, she is.

MR. RUHLE: Would Miss Lauer like to proceed with her hearing at this time?

MR. EHLKE: The answer is going to be the same in every case, Jim.

MR. RUHLE: Can we call her matter at 10:47?

MR. EHLKE: You are pushing us on the time now. You gave us 20 minutes to defend our livelihood, and now you're going to take away even that.

MR. RUHLE: Mr. Ehlke, we are here today to see what

the teachers have to say about the allegations that have been made. You don't need to deprive them of that opportunity. Counsel has asked them not to make statements.

MR. EHLKE: Are we here to settle a labor dispute or are we here to intimidate? What are we here for?

MR. RUHLE: To ascertain whether certain allegations are true. It has a responsibility in that area to all employees. It is in the pursuit of known reports this morning.

MR. EHLKE: Wouldn't it be right to say given the time, the opportunity, is to settle this dispute and get the people back to work?

MR. RUHLE: The Board did not go on strike. The Board did not cause closing of school for several weeks. We are here to see who did go on strike.

MR. EHLKE: If you know who did, why are you asking us?

MR. RUHLE: I would like each teacher to tell us whether they have a statement to make to the Board before the Board determines what disciplinary action, if any, is appropriate.

MR. EHLKE: Is that going to settle the dispute? Is that going to unchain the school doors—put the people back to work?

MR. RUHLE: Mr. President, Miss Lauer did not answer, or counsel did not consent to calling her matter prior to 11:00 o'clock. Therefore I would suggest that we wait and call that matter at 11:00 o'clock.

MR. EHLKE: And I would suggest that the Board consider bargaining. Because of this thing this morning, the Board has two lawyers present, the Union and people it represents individually and as an organization, has a lawyer present.

MR. RUHLE: Are we on the record? I think we should be off the record until 11:00 o'clock.

* * *

MR. RUHLE: Back on the record. Mr. Ehlke and I have had the ten-minute discussion off-the-record, and Mr. Ehlke is going to discuss with his clients that are present, the manner in which they wish to proceed, the question being raised because it is possible that his clients will on-the-record stipulate—at least those that have been served—that they received some advice from their counsel, which advice they do accept, and that it will not be necessary for the Board to call hearings at 11:00, 11:20, 11:40, and on into the afternoon and evening. Mr. Ehlke has a list of employees involved. I don't have a list, Bruce. I have copies of the notices. Any of your clients that have hearing for Tuesday and Wednesday, if they wish to handle it that way, state it on the record. If there are any who do not wish to handle it that way, we can handle it tomorrow and Wednesday.

MR. EHLKE: O.K. We believe it can be better handled by reaching an agreement.

(Adjournment: 11:00 a.m., to 11:53 a.m.)

CHAIRMAN OF THE BOARD: Let the record show we are back in session at 11:53, and that I requested camera men to also stop their cameras at this time.

MR. RUHLE: Were you both present during the time the rules of these proceedings were read?

MR. EHLKE: I wasn't present at the time the proceedings were read, unless we're talking about something different, Jim.

MR. RUHLE: At the commencement of this hearing, rules were read which included no filming or picture-tak-

ing is permitted in this hearing room. We again request that you gentlemen not film while this matter is in progress.

MR. EHLKE: I can't speak for members of the press.

MR. RUHLE: There are other rules that apparently you were not here when they were read, and I would like you to have a copy of those.

MR. EHLKE: I have just been handed a copy of six rules for the hearing held in April, 1974. The rules are 1. Smoking of any sort is prohibited in the building; 2. Silence is required unless one is asked to speak; 3. No filming or picture-taking is permitted in this hearing room. This is for the benefit of folks who weren't here earlier; 4. Only the door furthest from where the board is sitting will be used; 5. Only the lavatory services nearest this room are available for use; 6. Persons not respecting these rules will be permitted to leave the premises immediately. Was the rule not to take pictures?

MR. RUHLE The rule was not so limited. Gentlemen, are you going to insist on remaining and filming?

VOICE: Yes.

MR. RUHLE: I suggest we adjourn the proceedings for a few minutes. If Mr. Ehlke wishes to be heard on that, let's hear his position.

MR. EHLKE: I have not had any position from members of the Press and I don't know what their intentions or purpose is relative to taking pictures—interviewing, or whatever. You did ask me on these various individuals and I suggest we get on with the hearing. Maybe we should be bargaining.

MR. WEIHING: I grant counsel's request that we adjourn for a few minutes.

* * *

MR. RUHLE: Let the record show we are back into session at 12:09. Let the record also show in that 15 minute caucus, the Board re-evaluated the rule. We think that there is a legitimate interest in the media. We notice that there are not the lights which we feared would be a problem and if those people present, and counsel has no objection to the filming of the proceedings, we have no objection.

Now did you have a position, Mr. Ehlke, that you wanted to state, or are we back on the question of how to handle the hearings that are scheduled from 11:00 o'clock on?

MR. EHLKE: Position relative to what? You mean the media?

MR. RUHLE: No. You were going to speak with your people, whether we sit here all day and evening to handle the people as they came up. Have you made determination as to how you wish to proceed on that?

MR. EHLKE: Yes, I have conferred with the individuals who have written to me asking Lawton & Cates to represent them in this matter in matters arising out of this dispute. Incidentally, not all of the people have asked us to represent them, but Tonia Stamborski hasn't asked us to represent her in the dispute, but the other teachers have. They are as follows, and they are also individuals who have been served. I will read these names: John Amburgy, James Olson, Russ Hildebrand, Peter Jeffers, Darrell Johnson, Paul Kreul, Rosemarie Lauer, Tom Nadeau, Nanay Olson—incidentally, it's Mrs. Michael Olson, not Dennis Olson; Lila Nelson, Robert Newhouse, James O'Hern, Ruth Qualmann, John Quinn, Michael Ratsch, Rosemarie Olsen, Ardis Dobberstein, Kathleen

Weyenberg, Leslie Ellis, Carol Gruetzmacher, Ryan Hmielewski, James Larget, Carol Hoffman. Winifred Laabs, Ken Couillard, Donna Couillard, Ruby Abendroth, Marilyn Zimmer, Avis Sasse, David Hanke, Pat Grall, Michael Wisnoski, Linda Sue Bradley, David Emerich, Richard Fraaza, Dave Hettiger, Kay Jacobson, Rusna Keller, Tharen Robson, Kathleen Wilson, Ray Emerich, Richard Fraaza. Dave Hettiger, Kay Jacobson, Russel Lichte, Wilhelmine Pollard, Jack Rickaby, Ethel Beyer, Laura Cleven, Esther Emling, Nancy Miller, Elaine Exenberger, Mabel Grummer, Kathryn Herb, Sandra Herwig, Eleana Jurkowski, Mary Keller, Lois Lukesh, Susan Sachs, Carolyn Suess, Joy VanThiel, John Stieves, Edward Weber, Linda Wiegandt, Mildred Eisenreich, Ronald Hammond, Edith Haupt, Quintin Thede, Betty Edler, John Schindhelm, Catherine Schnoir, Karen Zeinert, Jean Wall, Kenneth Mertons, Judy Murphy, Patricia Weber, Jerry Addie, Gwendoline Alexander, Ruth Bruzewitz, Eleanor Krause and Jean Larson. All of those individuals have asked that I represent them in this particular matter; all those individuals have been served with this notice thing with either a blue backing or a white backing. As I understand it, there are as I have indicated—

MR. RUHLE: May I ask for two clarifications on that list. The name of that woman is Linda Thielke. Also, I have another question.

MR. EHLKE: I just checked my files and Linda Thielke has not requested that Lawton & Case represent her relative to the labor dispute, and I have been further informed that this lady is a part time teacher. Apparently the Union was unaware of her—she apparently doesn't have a written contract. To my knowledge she is not present, and I

know that she has not requested us to represent her. Which is also the case, of course, with Tonia Stamborski.

MR. RUHLE: I would like to also clarify Miss Triolo.

MR. EHLKE: To my knowledge, she is not present today.

MR. RUHLE: In any event, you did not mean to read that you represented her.

MR. EHLKE: No, I read the names of the people I represent that are here today. Yes, Carlarae Triolo has requested that we represent her, but she isn't here today, to my knowledge. Also Thomas Bellaire and Nancy Miller have asked us to represent them in this dispute, and they also to my knowledge are not present today, and to my knowledge have not been served with any kind of notice that they should come over today. And the same would be true with Mrs. Triola.

MR. RUHLE: Let the record show that Nancy Miller, Thomas Bellair and Mrs. Stamborski have not been served with notice.

MR. EHLKE: Weis is her maiden name—Stamborski is her married name.

MR. RUHLE: Mrs. Ballaire and Nancy Miller have requested that you keep them?

MR. EHLKE: Yes, but they haven't been served.

MR. RUHLE: Yes, and Mrs. Triola to my knowledge, has not been served. Mr. Ehlke, I don't mean to interrupt, but—

MR. EHLKE: That what I just related to you are the names of the individuals who have requested that I represent them and who are present today, and I have spoken to those individuals relative to proceeding in this matter, and each of them individually has indicated to me their

desire to follow my advice. This present matter and questioning by counsel for management in this labor dispute is coercive, is an interrogation, and the matters which are, management has informed it needs relative to who was working and not working, who was locked out and not locked out, and all that stuff. Any other questions would be interference with the individual's rights, and any other questions management may have concerning the dispute, should be addressed to representatives of the Union who represents all of these people, and indeed, your representatives stand ready right now to meet in bargaining agreement with the Board. If one-tenth of the effort that has been put into this hearing so far would be put into bargaining, we would be much closer to agreement than we are right now.

MR. RUHLE: Let's see if I properly understand here.

MR. EHLKE: We want to bargain.

MR. RUHLE: Do the individual teachers that you named wish to have their particular hearing called now so that they may respond, or so that you may respond on their behalf, so they would not answer questions, and so forth?

MR. EHLKE: We have already indicated, everybody got the same form, and they are all charged with the same thing. They have consulted and conferred among themselves and concurred that they have done or not done the same things, all of which would be within the knowledge of the management, and accordingly, they all stand together, and I represent all of them who I have indicated who are present today, and we believe if you are going to have a hearing and want to proceed, you proceed in all of the cases in one hearing, because they all involve

the same matters, and an attempt to single them out would be highly inappropriate. If you want to settle a matter, the thing not to do is pick out individuals. You sit down at the bargaining table and bargain. So we don't know what's on your mind, other than you certainly have as much knowledge of it as we do. If you want to proceed on hearing, it will be a hearing involving all these matters together.

MR. RUHLE: Have your clients authorized you to waive for them, to proceed in the matter in which the manner the Board has notified them the Board is proceeding?

MR. EHLKE: I think they have, but I would like to confirm it.

MR. RUHLE: I am concerned that the record shows that the individual teachers whom you have indicated you represent and have been served—and I am only talking about those individuals—waived their rights to the individual hearing as scheduled by the Board; they waived their right to make a statement to the Board; that they refused to answer questions that counsel might ask them in the manner in which they have been notified we were proceeding; and further that the Board may draw any inferences permitted by law for the Board to draw, based on their refusal to answer questions asked of them. I don't want to argue with you.

MR. EHLKE: I don't want to argue with you either, I just want to say that questioning—that's the reason why the general public thinks poorly of lawyers, because we are sitting here counting angels on a pinhead.

I will ask them questions and we will be back with you in about three minutes. I think this is beginning to be a lot of nonsense, and I am embarrassed for my profession.

MR. RUHLE: I am also sorry those present don't understand what we are attempting to do.

MR. EHLKE: You can argue what you are attempting to do. The question is, why don't you folks think about bargaining? As I understand it, you are prepared to sit here a few days, so why not take a shot for a couple hours this afternoon?

(Adjournment from 12:30 to 12:43 noon.)

MR. EHLKE: Is the Board ready?

MR. RUHLE: Yes.

MR. EHLKE: I consulted with my clients and we have discussed whether or not they wish to have a single hearing if you insist on going ahead with the thing on individual hearings. I have asked them if they understand relative to answering questions, and further we have discussed implications of their refusing to answer your questions, and with respect to refusing to answer your questions they have again repeated that they wish to follow my advice and not answer questions because of their interrogatory nature, and under the present circumstances the problem that exists, with questions by counsel from management being coercion and harrassment in a labor dispute such as this, they want the Union to answer questions for them, if you have questions. As far as the ramifications of their refusing to answer questions, I have conferred with Mr. Ruhle, and he has confirmed my understanding, and I have so discussed it with my clients, that the implication Mr. Ruhle referred to was that if these people do not answer questions propounded by Mr. Ruhle, it might be concluded they are engaged in a work stoppage, and that as I understand it, is the only inference that may be permitted in answer to the charges set forth in this document which is either bluebacked or white-backed notice of the thing today. There is in that charge, the sentence reads: 'You have breached your individual employment contract—you have engaged or participated in an unlawful strike contrary to Wisconsin law', and I would point out regardless whatever facts or inferences you folks think you might draw of failure of these people to respond to questions, that only goes to fact, the fact of breaching a contract is a legal question, and no individual can testify to that as a fact. Nor can any legal conclusion be drawn from a factual inference, and the same holds true with respect to illegality of a strike.

So again these people have advised me they will not answer questions for the reasons I have repeated over and over again.

They have also advised me to advise you that they wish, since they are all charged with the same thing, any hearing you wish to have should involve all of them and they don't wish to have individual hearings. As I understand it, individual hearings that have been scheduled would run through Wednesday and the evenings, and these people would much rather see the Board spending its time and the time of representatives of these employees, attempting to negotiate, to bargain in agreement, and to get this thing settled.

MR. RUHLE: Did I understand correctly previously when you went through the list of teachers that you represent, those were employees who had been served, with the exception you do represnt Mr. Bellaire, you represent one Mrs. Stamborski and Nancy Miller who are teachers who have not been served, is that correct?

MR. EHLKE: No, that is not correct. I have been asked

by Mr. Bellaire and Nancy Miller to represent them. They have not been served relative to any of these meetings or whatever we are doing this morning, Tuesday and Wednesday. Accordingly, my clients, Bellaire and Nancy Miller are not present for that reason. Mrs. Stamborski hasn't requested my representation or representation of Lawton and Cates. Mrs. Carlarae Triolo on the other hand has requested that we represent her in the dispute and furthermore I understand that she has been served with a document, I don't know if white or blue backing, but she has been served with a notice regarding these things we are doing at the present time. However, I have been unable to speak with Mrs. Triolo because she is a part time teacher and as I understand it, spends half her week working in a different school district and presently employed working at her other job, and as a result isn't available and hasn't been available to talk to me in the present proceedings, although she has asked me to represent her.

MR. RUHLE: With respect to Mrs. Triolo, would you agree to contact her and see if she takes the same position your other clients take, and notify us of that? If we have not heard from you, we will be present at 11:30 on Wednesday. What I want to do is see if we can find some acceptable way to not convene if Mrs. Triolo wishes to be represented.

MR. EHLKE: With that knowledge, we agree to do that, and I will make an attempt to do that in the next hour or two or as soon as the present proceedings are adjourned or whatever. Again, the reason we are interested in expediting these things, if you scheduled this much time to have hearings, it seems to me we have an ideal situation to spend some time bargaining. If we can shorten up the hearings, as I understand your schedule, at least

the rest of the day until 10:30 and Tuesday and Wednesday you have scheduled yourselves for school meets, and this would be a real good time to settle your bargaining problem. That's the only thing that's ever going to settle your dispute and you have a good chance to do it now.

MR. RUHLE: For clarification, Bruce, it was also your representation that those teachers, the names of which you read off, are present today, is that correct?

MR. EHLKE: Right. Mrs. Triolo was the only one served with a document who isn't present today, and that's because of her other employment.

MR. RUHLE: And you will let us know if she wants to have a hearing on Wednesday at 11:30?

MR. EHLKE: Right.

MR. RUHLE: And if she does, her position will be the same as your other clients?

MR. EHLKE: Yes.

MR. RUHLE: I have nothing else. Does anyone have anything else for the record? If not, I think the President can adjourn—

MR. EHLKE: Just a second. Let me think about it. Can I take five minutes to consult in the hallway?

MR. RUHLE: Sure.

MR. EHLKE: My first question is, in effect, because of the Board's involvement as to managment of this School District and its involvement in the labor dispute which is the basis for the board's consideration, but hard for a neutral tribunal and some disinterested third party. It seems to me it is no more fair that you should sit in judgment of the employees and the employees should be challenged to have violated your office by conduct in labor matters. What we have to have is a third party and I would like an answer to that.

MR. RUHLE: As I advised you on the 'phone yesterday, the Board is the proper party in the first instance to make decisions of this sort, and it will do so, sir.

MR. EHLKE: They are prepared to hold a hearing?

MR. RUHLE: You have your objection on the record.

MR. EHLKE: Do I understand it then, management people are resting their case?

MR. RUHLE: I understand management was forced to rest their case because the parties will not participate in hearings as planned by the Board.

MR. EHLKE: Without waiving our total objection to this proceeding, to the lack of timely notice, and opportunity to prepare and to the Board sitting as the judge in this matter, we do have some evidence we would like to put into the record.

MR. RUHLE: I would like you to be more specific on your timely notice objection. You stated your nature of the objection, that the teachers were served beginning Friday evening and some on Saturday, and this morning we were talking about it, they were served Friday evening. You did not make any request of the board that those matters be adjourned. I don't want you to reserve your argument on timely notice without being a little more specific for us in terms of what you feel would be necessary for you to represent those people who were scheduled for hearing between 9:00 and 11:20 this morning.

MR. EHLKE: To the extent that you aren't offering any evidence against any specific individual, we are prepared at this time to present some evidence just for the purposes of the record, not litigation or defense. But that doesn't waive our objection to the general manner in

which these proceedings have been held, in particular to the fact that the Board is purporting to sit as judge.

MR. RUHLE: I understand that, Mr. Ehlke, but still you raised several problems, one that the Board is the maker, #1, is timely notice. I want you to have opportunity to be prepared if you intend to represent those people in the production of evidence.

MR. EHLKE: We are wasting everybody's time with these hearings, to begin with. What I would like to do at this time is put in the evidence I have, and if at the conclusion of that I find I need more time, I will let you know at that time. But I don't think it serves anybody any good to sit here all the time and not do anything, or even to have some kind of a reconvened date. That doesn't make sense at all. You have to get this thing resolved and the best way is to bargain. We will put in our recitation right now, what we have.

MR. RUHLE: But your position remains the same with reference to the Board putting in evidence, whatever it wants to put in?

MR. EHLKE: Sure. You have rested your case.

MR. RUHLE: All I want the record to reflect is whether this reflects difference in position in asking each particular teacher some questions.

MR. EHLKE: No, and I don't intend to call each individual teacher.

MR. RUHLE: Will you give us some kind of inkling as to the nature of the evidence you wish to present?

MR. EHLKE: Yes, it goes to bargaining here, and I have some questions of some of the Board members.

MR. RUHLE: I will advise the Board as I think I advised you on the telephone yesterday, that the bargain-

ing is immaterial to the allegations in the notices. They are immaterial.

MR. EHLKE: Then I would like to make an Offer of Proof.

MR. RUHLE: All right, you may do so.

MR. EHLKE: Our Offer would be that the proposals for the 1974/1975 as presently on the table; were not significant representation, regressive—in particular the salary schedule structure, and regressive salary schedule; the grievance datelines were regressive; the proposals regarding work-day previously agreed to which the parties and the employer was proposing to have unilateral, which no employee in their right mind could agree to. There was a proposal the Board made to be included in the 1974/1975 collective bargaining agreement that had to do with professional responsibility, but it was a proposal that attempted to govern the interim affairs of the Union, and that's wrong. We would furthermore put into evidence that relative to the calendar for 1973/1974 schocl year, the Board acted through its agents, Mr. Obry, I believe it was the whole student body, and it is our position that is interference in the bargaining process, it is a coersive device, attempted to bring an outside party to the bargaining table—in this case, the student body. Furthermore, the Board has refused to discuss insurance provisions proposed by the Union; has refused to discuss a fair share. Since this action began, at least in the last two weeks, in response to numerous requests by the Union seeking bargaining and attempting to resolve the parties' differences at the bargaining table, which is where it has to be resolved, the Board has refused these overtures and instead has done what we are at today here.

We further would prove that the Union wasn't notified of the efforts of the overtures to the individual employees which brought them here today. The Union wasn't notified previously when the employees were disciplined by docking of their pay, and this is a denial of the employees' right to be represented; unilateral dealing, which is unlawful.

We further would prove some of the lost teaching time has been occasioned by employees being locked out of their places of employment. In fact, as I understand it, one time chains were put on the door which not only constituted violation of the labor law, but as I understand it, is violation of the safe place statute. There were children in the building when chains were put on the doors, locking them in.

Furthermore, relative to information concerning salary—and that's one of the big items that presently divides the parties—officers of the Union and particutarly Mr. Wieniewski and Mr. Counard have been denied information they sought information on, in February. They requested certain information in March, March 31st of this year, and that information was denied to the Union. That information was pertinent to the salary negotiations which are one of the things still on the table.

I think we can prove since this bargaining began, and that was in January, 1973, believe it or not, the makeup of the Board's bargaining committee has changed in considerable respects. People have left and other people have come on; the spokesman has changed: one time Mr. Vergimos, one time Mr. Brakway served as spokesman, Mr. Brown served as spokesman, and all of this has had a tendency to undermine the bargaining process, and

made bargaining virtually impossible. If you keep changing personnel and spokesmen, how in the world can you resolve differences. That's what we will show. That is the information I have been able to learn, that I have been advised of, and I would be prepared, and also prepared to put into the record through witnesses today. There may be more, but I haven't had a chance to investigate the matter that fully, because of time limitations.

MR. RUHLE: Mr. Ehlke, I would like to very briefly respond to the Offer of Proof.

MR. EHLKE: Do you have counter-offer of proof?

MR. RUHLE: The record reflects that I am responding to the Offer of Prove. Now could I proceed?

MR. EHLKE: It depends on what your purpose is. If you have a counter-action to prove that would be appropriate.

MR. RUHLE: My recommendation to the Board is that it did not consider evidence of the sort enumerated in Mr. Ehlke's Offer of Proof. It is on the one hand immaterial to the alleged conduct; it is on the other hand the right kind of allegation and form of adjudication of allegations, and then, of course, the Board doesn't need to defend itself against allegations that are to the extent directed one-sided. So I would recommend that they not permit Mr. Ehlke to proceed to prove what he has just offered to prove.

MR. WEIHING: Is it so ordered.

MR. EHLKE: I certainly think it is.

MR. RUHLE: I am sure you do, Mr. Ehlke, because you have offered to prove it.

MR. EHLKE: If your employees are engaged in work stoppage there is provocation, and if there is provocation,

it certainly has something to do with whether or not you're going to discharge them. That's what you are talking about here, when you are talking about breaching a contract and discharging somebody, because of that. There has to be just cause. Maybe you did punch the foreman in the mouth, but if he provoked it and caused it to happen, then that act of punching him in the mouth isn't cause for discharge. If more than your employees are engaged in work stoppage, perhaps some conduct by management people is a prerogative and certainly should be taken into consideration if you are going to discharge somebody. That's why it is material and relevant. As far as appropriate forms going out, as I said before, we objected to this proceeding, but beyond that it isn't going to do us any good, nor you, if we go to Employment Relations Commission with complaints that you have been bargaining in bad faith or we have been bargaining in bad faith. It isn't going to do you any good to have hearings or things we have done today. We can all stand and say we are people of principle and I am standing on my rights, and these people too, or you people may be doing. We must settle, and to do that you have to sit at the table and bargain, and we could do it in half the time you have already scheduled for whatever those things are with your employees. That's the only way you're going to settle it.

We are ready and these people are ready to meet with you and bargain with you two hours from now, one hour from now, a half hour from now, or three fours from now, and to bargain with you through the evening. The time you scheduled these things tomorrow, we will bargain with you then. That's the way to solve the problem. We are asking to bargain.

MR. RUHLE: I thought we had set this matter behind

us on the individuals involved, but I don't think we addressed the question of Mr. Bellaire and Miss Miller who have not been served. The only question I have, I foresee the necessity for serving them with a Notice of Hearing.

MR. EHLKE: Why don't you bargain in agreement, Jim. By the time you have them served, the whole thing would be over with and you wouldn't have to be fooling around with it.

MR. RUHLE: Mr. Ehlke, there are many ways to dissolve a labor dispute.

MR. EHLKE: Meeting at the bargaining table is the way to do it.

MR. RUHLE: Mr. Ehlke, if we have refused to do that, you have your forum.

MR. EHLKE: That is not going to solve the problem.

MR. RUHLE: That, Mr. Ehlke, is a concern of mine, because the board has set a specific purpose for today and it is not to consider whether WEAC is a proper forum for improper conduct by the Board. Mr. Bellaire and Miss Miller will be receiving a notice unless we have a different arrangement with respect to a hearing. I don't know if you are prepared to inform us what their position is, or not.

MR. EHLKE: Frankly, I am not, at this time. You go ahead and serve them. But in the meantime, the Board has a few words left. As I understand it, the Board or its agents know where representatives of the Association will be contacted, and they will be there waiting with hope in mind that the Board will contact them and try to bargain, starting today.

MR. WEIHING: If there is nothing more, the hearing is adjourned.

(ADJOURNMENT: 1:20 o'clock p.m. 4/1/74.)

STATE OF WISCONSIN

ss.

COUNTY OF BROWN

I, Eunice L. Reynolds, a Certified Stenographic Reporter, with offices located at 822 South Jackson Street, Green Bay, Brown County, Wisconsin, do hereby certify that I reported and transcribed to writing the foregoing Hearing in re: Striking Teachers, held before the Hortonville School Board, on Monday, April 1, 1974, at 9:00 o'clock a.m.;

That the same is true and correct (except perhaps as to phonetic spelling of names) according to my original shorthand notes taken at said time, and the whole thereof.

Dated this 4th day of April, 1974.

/s/ EUNICE L. REYNODS

[EXHIBIT # 9, APRIL, 1974]

BOARD OF EDUCATION

HEARING OF: Mrs. Toni Stamborski, held at the Hortonville High School in Hortonville, Wisconsin, on the 1st day of April, 1974, A.D., held before the Board of Education.

APPEARANCES: MR. JAMES K. RUHLY of Madison, Wisconsin, and MR. DAVID BRATHWAITE appeared on behalf of the Hortonville Community Schools.

MRS. TONI STAMBORSKI appeared without counsel.

MR. RUHLY: May I proceed, Mr. President?
MR. PRESIDENT: Proceed, Counsel.

TONI STAMBORSKI, being first duly sworn on oath, was examined and testified as follows:

EXAMINATION:

BY MR. RUHLY:

Q Your name is Mrs. Stamborski?

A Yes.

Q And the first name is?

A Toni.

Q Mrs. Stamborski, you are employed, are you not, by the Hortonville Community Schools?

A Yes.

Q Let me show you a document, the typed portion of which is a document addressed to you and I ask you if you ever seen that document before?

A No.

Q Okay. Mrs. Stamborski, earlier this afternoon did you and I—I might state my name is James Ruhly—did we have a telephone conversation?

A Yes.

Q And did you at that time inquire as to whether it would be possible for you to have a hearing this afternoon?

A Yes.

Q And did I at that time advise you that you had a right to written notice of the hearing and the reason?

A Yes.

Q And did you advise me that you would waive your rights to those?

A Yes.

Q Did I also advise you we were concerned here with the allegations that you have breached your individu-

al employment contract and that you have engaged in an unlawful strike contrary to Wisconsin Law?

A Yes.

Q And did I advise you on the telephone that you had a right to appear with counsel if you desired?

A Yes.

Q Now, Mrs. Stamborski, this morning Attorney Bruce Ehlke, representing several other teachers, appeared and asserted to the Board that Mr. Ehlke did not represent you, is that true?

A Yes.

Q And do you have counsel that you would like to have with you today?

A No.

Q Okay. Mrs. Stamborski, the Board previously had set hearing with you for Tuesday April 2nd, 1974, at 8:20 o'clock in the forenoon. Do I understand that you would like to proceed with that hearing at this time?

A Yes.

Q And in the document that you just identified as having never seen before, that document advises you that you have an opportunity to present any statement or evidence relevant to the alleged conduct that I enumerated previously, and did I so inform you on the telephone this afternoon?

A Yes.

Q Do you have any evidence or statement relevant to the allegations that you would like to present to the Board at this time?

A I don't quite follow all that.

Q Okay. Do you have any evidence or any statement that you would like to present to the Board or say to the

Board at this time with respect to the allegations that you breached your individual employment contract and that you engaged in an unlawful strike contrary to Wisconsin Law?

A No, I guess. No.

Q Mrs. Stamborski, did you in fact absent yourself from your teaching duties the weeks beginning March 18th and March 25th?

A Yes.

Q Where you ill during that period of time?

A No. I think I have a ulcer now, though.

Q Okay. Can you tell us why you were not at school during that time, those two weeks?

A I don't want to be harrassed, that's why I didn't come back, afraid.

Q You were afraid of what?

A Just my relationship with the other teachers if I came back.

Q Okay. You do have an individual teaching contract for this year, do you not?

A Yes.

Q Since March 18th have you received several communications from the Board of Education signed by Mr. Obry?

A Yes.

Q Did you read those communications?

A Yes.

Q Let me show you particularly a letter dated March 23rd, 1974. That does not have a salutation or does not have a name in the salutation area and is signed on the second page by Marvin Obry, and I ask you did you receive a copy of that letter?

A Yes.

Q Did you read the letter?

A Yes.

Q Yes?

A Yes.

MR. RUHLY: Off the record.

(Discussion off the record.)

Q Back on the record. Mrs. Stamborski, I show you a one-page document that purports to bear the signature of Toni Weix. Was that your maiden name?

A Yes.

Q That was your name I take it on or about March 12 last year?

A Yes.

Q And that is your signature?

A Yes.

Q Okay. And is this a copy of your individual teaching contract?

A Yes.

Q Now, also in the notice, the written notice, which you have waived your right to receive but which other individuals have received, the Board points out that the conduct that you have engaged in or that you were alleged to have engaged in subjects you to disciplinary action by the Board including termination of your employment contract that you have identified and acknowledged that individual teaching contract which incorporates entirely collective bargaining agreements dated May 8th, 1972, and which also purports and states that it is a solemn and binding contract not to be breached by either party without good or sufficient grounds. I would like to ask you has your absence from work the weeks of March

18th and 25th been based on good and sufficient grounds, and if so would you advise the Board what those grounds are?

A Well, I think it's with grounds. I just have been afraid to come back, that's all. It's not that I haven't wanted to teach. I'd just as soon not have a really poor relationship because things can be rough at the end of the year. I just didn't want things made really rough.

Q Were you picketing during part of the time?

A Two days I did.

Q What days were those, do you recall?

A The first two days.

Q March 18th and 19th?

A Yes.

Q You have not picketed since that time?

A No.

Q Have you discussed with your Association representative your feeling about wanting to return to work?

A No.

Q Okay. Have you considered your absence from school those two weeks to be part of a strike activity by your bargaining representative?

A No.

Q Will you tell us what you have considered you absence to be because of or due to?

A Because of being afraid.

Q And this fear, as I understand it, is a fear of what?

A Of my colleagues, you know, just of being harrassed and that type of thing.

Q Okay. Was that also the reason that you were not in school on March 18th and 19th?

A Well, March 18th I came to see what was going on

more or less, you know, to see what was happening. That was probably the only reasons I came.

Q What about March 19th?

A I came to see what I had involved myself in so I could make up my mind from there.

Q With respect to the 19th, what was the reason for your absence on the 19th?

A I think more or less just relationship with the teachers. Then I decided after that that my teaching was more important than my relationship, so that's why I didn't continue coming.

Q Now, has there been any period in those two weeks beginning March 18th and March 25th when you have been prevented by the School System from returning to work?

A No.

Q And were you aware that your colleagues were engaged in a concerted work stoppage against the School District?

A Yes.

Q Now, that's all the questions that I have. I would like you to say anything that you would like to say to the Board keeping in mind the alternatives that the Board has if it finds you guilty of the alleged conduct, specifically keeping in mind that this could subject you to termination of employment. Is there anything you would like the Board to know prior to its consideration of that question?

A No.

MR. RUHLY: Do you have any questions?

MR. BRATHWAITE: No.

MR. RUHLY: Does any Board member of any questions they want to ask Mrs. Stamborski?

(No response.)

MR. RUHLY: Okay. That would conclude the matter.

(Witness excused.)

CERTIFICATE:

STATE OF WISCONSIN

ss.

OUTAGAMIE COUNTY

I, James F. Henes, Official Court Reporter and Notary Public in and for Outagamime County, Wisconsin, do hereby certify that the foregoing proceedings were reported by me in Shorthand and reduced to writing by me and is a complete, accurate and true transcript of said proceedings.

DATED: April 3, 1974

/s/ JAMES F. HENES
Court Reporter

[EXHIBIT 10, APRIL, 1974]

BOARD OF EDUCATION:

The following proceedings were had at the Hortonville High School in Hortonville, Wisconsin, on the 2nd day of April, 1974, A.D., held before the Board of Education.

APPEARANCES: MR. JAMES K. RUHLY of Madison, Wisconsin, and MR. DAVID BRATHWAITE of Hortonville, Wisconsin, appeared on behalf of the Hortonville Community Schools.

LAWTON & CATES of Madison, Wisconsin, MR. BRUCE EHLKE of that firm appeared on behalf of Nancy Miller, Linda Thielke, Carla Triolo and Thomas Belaire.

THE PRESIDENT: Counsel, are you ready to proceed?

MR. RUHLY: Are you, Bruce?

MR. EHLKE: Yes, As I understand it, Mr. Ruhly and I had several phone conversations and questions regarding a number of people who had not at that time been served with your notices of this meeting you wanted to have, Monday, Tuesday and Wednesday and also—or who had received a copy of that notice and had not—were not present yesterday, and the question that Mr. Ruhly had was what was the position of these people concerning having separate hearings and concerning answering questions propounded by the management, and the people in question were Nancy Miller, Linda Thielke, Carla Triolo and Tom Belaire. Are there any others, Jim?

MR. RUHLY: I think that covers it, Bruce.

MR. EHLKE: Okay. Well, now, I have contacted these people. All of them requested that the law firm of Lawton & Cates represent them in all matters concerning the labor dispute, and the position of these people is as follows: Nancy Miller and Linda Thielke and Carla Triolo take the position that as far as individual hearings they adopt the same position as all other teachers who were present yesterday and that is they wish their employment to be considered in the same boat as all the other employees, the teaching employees, and they do not wish to have a separate hearing or a separate session with the Board of Education. The union or the Hortonville School Association is their representative and will speak for them, and in

that same vain it's further their position that if any questions—if there was an attempt to propound any questions to them by management or its agents, they would refuse to answer those questions for the same reason that the other employees refused to answer those questions, which were that the union represents them and that an attempt to question them as individuals would be improper. Mr. Belaire adopts the same position. He has requested that as his lawyer I make a personal statement on his behalf, which is that he believes that the only way to settle this matter, and I believe he may have expressed this sentiment to Mr. Obry last night, the only way to settle the matter is for the Board of Education to bargin an agreement to reach an agreement with the Hortonville Education Association and the people it represents; that so long as there is no bargaining session scheduled, it would be senseless for him to have any kind of an individual hearing or to answer any questions by management agent, and for that reason he personally makes the plea that the Board bargain with the Association. He wishes his case to be considered. He doesn't want a separate hearing. He wants his matter to be considered with all the other teachers, and he says there is no purpose in answering any questions.

I believe that covers it unless you have any other questions, Jim.

MR. RUHLY: Just a second, please. Mr. Ehlke, for purposes of the record, do I understand that Miss Miller waives her right to have a personal copy of the charges served upon her prior to having you make this statement for her? I assume that to be the case.

MR. EHLKE: I would assume it to be the case. She

has asked that I relate that to you. I don't know if she has been served a copy or not.

MR. RUHLY: She hasn't.

MR. EHLKE: I thought she had been.

MR. RUHLY: I don't believe she has. One of the items that we discussed yesterday was whether we could serve Miller and Belaire just prior to a hearing if we could have the hearing today, and because Mr. Belaire yesterday took a position that he would take no position before receiving the charges, he was served yesterday evening.

MR. EHLKE, By yourself I understand.

MR. RUHLY: By me. And Miss Miller has not been served.

MR. EHLKE: I don't know if she has been served or not, but she has asked me to relate to you what I have just related to you, and I guess that's her position.

MR. RUHLY: Okay.

MR. EHLKE: So if you want to serve here with something, she said her position is she wants to be judged with all the rest and that she wouldn't answer any questions that were attempted to be put to her by management agent.

MR. RUHLY: When you spoke with Mr. Belaire, did he raise any question with respect to the fact that he received the charges or the notice last night, any question with respect to taking a position by 10:20 this morning, did he raise any question with you?

MR. EHLKE: He had a question with the hearing time that was scheduled, which was tomorrow as he informed me; that there was a question of short notice, but his primary concern was the fact that there was no bargaining comment.

MR. RUHLY: He authorized you to make this statement to the Board that you have made?

MR. EHLKE: Yes, he did.

MR. RUHLY: Okay, Mr. Ehlke. for the record could we note the appearances. You don't have to necessarily note those gentlemen who are here to observe, but I would note that Mr. Watson is with Mr. Ehlke today. Are there other apperances on the record?

MR. EHLKE: Okay. Well, of course, I am here as you are aware because I have been talking.

MR. RUHLY: Glad to get that clarified.

MR. EHLKE: And as you have indicated, Mr. Watson is here, the five representatives of the Hortonville Education Association, and I will ask them each individually to identify themselves.

MR. LICHTE: Russell Lichte.

MR. OLSON: James Olson.

MR. ELLIS: Lesley Ellis.

MR. LARGET: James Larget.

MR. ADDIE: Jerry Addie.

MR. RUHLY: Let the record also note that the seven Board members are present as is Mr. Braithwaite and Mr. Obry and James Ruhly.

MR. EHLKE: And another man.

MR. RUHLY: And Mr. Sean Brown just came in, but he is not representing the School Board here.

MR. EHLKE: Is that Mr. Sean Brown of the Wisconsin Association of School Board fame?

MR. RUHLY: Yes. Is there anything else, Mr. Ehlke that you or Mr. Watson wanted to state for the record?

MR. EHLKE: No. Merely that again as we said yesterday, that the only way to solve this matter is to reach an agreement, and it seems to me we expended a lot of energy and time in the last thirty-six hours and we haven't done

anything really to get together to work out an agreement which is the only way that the matter is finally going to be resolved. I would hope we can hear from the Board sometime very shortly regarding a meeting to bargain.

MR. RUHLY: Let the record show Mr. Ehlke stated that position yesterday and I responded to that position. If there is nothing else that you have, gentlemen, thank you and I guess that would conclude the hearing.

THE PRESIDENT: Let the record show the hearing was adjourned at 10:38.

MR. EHLKE: While we're on the record—

MR. RUHLY: Why do you want to go on the record?

MR. EHLKE: Just for the fun of it. This morning I served David Brathwaite, the Attorney for the Board on the replevin action. It's the case that says "give us back our keys." In that case I served Mr. Brathwaite with copies of notice of retainer and request for change of Judge in that matter which had been scheduled for tomorrow; is that correct, Mr. Brathwaite?

MR. BRATHWAITE: That's correct.

MR. EHLKE: Okay.

(End of proceedings.)

CERTIFICATE:

STATE OF WISCONSIN

ss.

OUTAGAMIE COUNTY

I, James F. Henes, Official Court Reporter and Notary Public in and for Outagamie County, Wisconsin, do hereby certify that the foregoing proceedings were reported by me in Shorthand and reduced to writing by me and is a complete, accurate and true transcript of said proceedings.

DATED: April 3, 1974

/s/ JAMES F. HENES
Court Reporter

[EXHIBIT #11, APRIL 11, 1974]

STRIKE INFORMATION

The teachers strike called by the Hortonville Education Association this morning is the result of an ultimatum made by the teachers earlier this year when they said that unless an agreement for the 1974-75 school years was reached by March 15, they would strike. So despite the fact that negotiations were progressing on both March 15 and 16 and despite the fact that both the Board and teachers have agreed on a settlement for this school year, the teachers went on strike.

Previous to this, the Board, upon the HEA's insistence, agreed to submit to fact finding to resolve the differences between the two parties. David Johnson, a professor of economics at the University of Wisconsin, Madison, was selected by both the HEA and school board to serve as the fact finder. Johnson, a well-known author on labor relations, worked in employee relations for the U.S. Atomic Energy Commission and for the National Labor Relations Board.

His experience and expertise in the labor relations field were viewed favorably by both parties; however when his report came out, the HEA unilaterally rejected it, c'aiming that the criteria used by the professor in his findings of fact were not adequate. The school board, though, agreed to Johnson's conclusions and in turn were willing to implement them; but because of the teachers' rejection, the board, in an attempt to reach an accord, offered to

exceed the fact finder's recommendation on money by approximately $9,000. The HEA rejected this, too.

Representatives of the teachers' union and board resumed negotiations at the bargaining table and eventually came to a general agreement on contract proposals for the 1973-74 school year. Although both groups came to this agreement, the contract for this school year has not been officially ratified. Instead, the union representatives continue to refuse to formally accept it until a settlement for the next school year is reached. At the same time, the union arbitrarily set the March 15 deadline as a cut-off date for negotiations for a 1974-75 contract—this is despite the fact that most school districts in Wisconsin have just started negotiations for next year.

At the time the HEA gave its strike ultimatum to the Board, the teachers also told the Board it could have six meetings in which to discuss their 30-page proposal and to come to an acceptable agreement.

The money salary proposal of the teachers Association at present is approximately $36,000 higher than the Board offer. This is above and beyond the $75,000 Board package already offered.

Also requested is:

- A full dental insurance program, life insurance, sick leave coordinated disability, income protection and auto policy on teacher cars used to transport students. Total cost about $25,000 the first year.

This makes a total of $61,000 still being requested by the Association.

The present teacher proposal besides money includes such items as:

- Maintenance of standards clause (this means that the

Board could not ever take something away that is a present practice). Example: If it is a practice to let a teacher go to the bank during the school day, it could never be denied.

- Limiting the number of students to be placed in any room. What if the limit is set at 25 and 27 want to take the class?
- Agency shops—Every teacher will have to pay union dues.
- Twenty (20) Association days. This means officers and directors of the Association would get twenty days per year to do association business, with pay. Example: Negotiate during the school day.
- Plus the Association does not wish to accept the Board's modified no strike clause. This no strike clause of the School Board is the only one left on the table for the Board. The other six the Board had were dropped.

During the strike, the Board had four (4) options open to have teachers return to work. They were:

(a) meet their requests.

(b) fill the school with substitutes.

(c) ask for a court order returning them to class.

(d) send them a letter of termination and hire permanent replacements.

The Board choose option (b) because they felt the strike would be short lived. Options (c) and (d) are still available but the Board prefers not to upset the entire school community by declaring such drastic action as option (d).

The last page of this report indicates some of the school settlements in the area for 1974-75.

SALARY COMPARISONS

	1973-1974 BA / MA — HEA & Board Proposal	1974-75 BA / MA — Board Proposal
HORTONVILLE	7550/11627(13) 8200/12628(13) STRS - 3½%	7900/12166(13) 8550/13167(13) STRS - 4½%
KIMBERLY	7650/11628(13) 8150/13366(16) STRS - $175 - 375	7850/11932(13) 8350/13694(16) STRS - $250 - 500
LITTLE CHUTE	7600/11248(12) 8360/12373(12) STRS - $266 - 453	7800/11544(12) 8580/12698(12) STRS - $318 - 531
MERRILL	7500/11290(12) 8190/12700(12) STRS - 4.5%	7850/11813(12) 8540/13238(12) STRS - 4.5%
OCONTO	7450/11470(12) 7950/12246(12) STRS - $225 - 525	7725/11901(12) 8325/12825(12) STRS - $225 - 525
SHAWANO	7600/11324(12) 8208/12768(12) STRS - 0-7 $200 8-14 225	7800/11622(12) 8424/13104(14) STRS - 0-7 $275 8-14 300
CLINTONVILLE	7500/ 8100/13420(14) STRS - 0-3 $105 4-7 138 8-11 168 12-16 200	7800/11300( ) 8400/13520( ) STRS - 5%
SHIOCTON	7300/10220(10) 7800/11888(14) STRS - NA	7700/10780(10) 8150(11)/ 12154(14) STRS - $215 - 0 250 - 5 375 - 10 500 - 15 600 - 16
APPLETON		8050/12341(13) 9016/14786(13) STRS - 5%
WILD ROSE		7850/10350(10) 8350/11350(12) STRS - $150 - 200 - 250

[EXHIBIT # 12, APRIL 11, 1974]

HORTONVILLE COMMUNITY SCHOOLS

April 2, 1974

A special school board meeting was called to order by Mr. Weihing at 1:30 PM and found all members of the school board present. Stated purpose of the meeting was what action if any the School Board will take to cope with the teacher's strike. Only personnel problems were discussed.

A motion was made by Mr. Suprise and seconded by Mrs. Meads to pass the resolution attached: (termination of contract) The vote for the resolution was unanimous: Mrs. Meads - yes; Mr. Plamann - yes: Mr. Meyer - yes; Mr. Hauk - yes; Mr. Schroth - yes; Mr. Suprise - yes; and Mr. Weihing - yes.

It was moved by Mr. Plamann and seconded by Mr. Schroth that the following resolution be adopted: Resolved, that the administration of the Hortonville Community Schools is directed by the Board of Education to immediately commence recruitment within and outside this district, of professional staff for the remainder of the 1973 - 74 school year; that the Superintendent shall notify the Board of Education by noon on Saturday, April 6, 1974, whether sufficient staff will be available for the reopening of schools on Monday, April 8, 1974. Motion was passed unanimously.

A motion was made by Mr. Meyer and seconded by Mr. Schroth to adjourn. Motion was carried.

R. Hauk, Clerk

RESOLUTION

Resolved, that all teachers, heretofore served with notice of hearing dated March 29, 1974, or who waived such service through legal representative, which notice alleged breach of employment contract and participation in an unlawful strike, are guity of such conduct and are therefore hereby terminated as employees of this district, effective immediately, except Toni Stamborski; that such termination of employment includes withdrawal of the tendered employment contract for the 1974-75 school year, and/or termination of said contract; that the Board President shall prepare, after consultation with counsel, and send, certified mail, return receipt requested, notice of such action to such employees; that said notice shall inform such terminated employees that his or her district-paid WPS hospital insurance is paid through the month of April, 1974; that said notice shall inform such terminated employees that they may apply for vacant positions in the District, and that Tonia Stamborski be sent a letter by the Board President reprimanding her for her participation in the unlawful strike and her breach of her employment contract, with a copy of said notice to be inserted in her personnel file; and that a copy of this resolution be sent to the President of the Hortonville Education Association.

Adopted by the Board of Education

April 2, 1974

[EXHIBIT # 13, APRIL 11, 1975]

HORTONVILLE COMMUNITY SCHOOLS

April 5, 1974

A special school board meeting was called to order by Mr. Weihing at 11:30 PM and found all members present - consent forms were signed.

The purpose of the meeting was to take action in the case of Margaret Powers.

It was moved by Mr. Plamann and seconded by Mrs. Meads to adopt the following resolution:

RESOLUTION

Resolved that Margaret Powers, heretofore served with notice of hearing dated April 3, 1974, or who waived such service though legal representative, which notice alleged breach of employment contract and participation in an unlawful strike, is guilty of such conduct and are therefore hereby terminated as an employee of this district, effective immediately, that such termination of employment includes withdrawal of the tendered employment contract for the 1974-75 school year, and/or termination of said contract; that the Board President shall prepare, after consultation with counsel, and send, certified mail, return receipt requested, notice of such action to such employee; that said notice shall inform such terminated employee that her district paid WPS hospital insurance is paid through the month of April, 1974; that said notice shall inform such terminated employee that they may apply for vacant positions in the District.

A roll call vote was taken for the motion and found

Suprise - yes; Schroth - yes; Hauk - yes, Meads - yes; Plamann - yes; Meyer - yes; Weihing - yes.

A motion was made by Mr. Meyer and seconded by Mr. Suprise to adjourn. Motion was carried.

R. Hauk, Clerk

STATE OF WISCONSIN OUTAGAMIE COUNTY CIRCUIT COURT

[Caption and appearances omitted from printing]

TRANSCRIPT OF DECISION ON APPELLANTS' MOTION FOR A TEMPORARY RESTRAINING ORDER

(From the Bench)

April 11, 1974

The Court: Ladies and gentlemen, I will read my decision in this case. I will ask that everyone who is in the courtroom remain present. I don't anticipate more than about fifteen, twenty minutes, so please remain present so we don't have people getting up and leaving during the course of my decision. And, Counsel, inasmuch as I did not interrupt arguments this afternoon I of course, request the same courtesy in delivering my opinion this evening.

As I am sure each one of you can realize perhaps the most difficult part of being a judge is to hear a case of this magnitude, a case that is not only important to the plaintiffs, not only important to the defendants but a case that reaches far beyond the walls of this courtroom. It reaches out to the people in the Hortonville School District, and perhaps most important—to the children in that school district.

Over the last couple of days you have heard many legal principles expounded here in the courtroom, some fine legal hairs split, arguments on evidence, but in the great scheme of things we shouldn't lose track of the fact that we are attempting to do justice, and that in a matter such as this, unfortunate as it is, the courtroom is the place where these decisions are to be made.

The Court's decision in this case is not going to resolve the conflict that now exists. As in any labor dispute the place to reach agreement is at the bargaining table, not in the courtroom, not on the streets, and not in the news media. I think most of you are aware that in the courtroom this evening are the three commissioners of the Wisconsin Employment Relations Commission and they have been here since yesterday. One of them since Sunday at my request. The other two joined us yesterday at the request of Governor Lucy [sic]. This is an important case and the eyes of the State are upon us. They are upon you the participants and how you conduct yourself after you leave the court room this evening.

I will now read my opinion.

The Circuit Court jurisdiction is created and limited by Article 7 Section 8 of the Wisconsin Constitution. I might just interrupt myself and preface any further remarks by saying I believe this case to be of such magnitude that the Court is going to couch its decision in legal terms as much as possible not for the sake of confusing you so that it takes you two hours to figure out what I said or what I did, but I think it is a case of such magnitude that either side may want to appeal the decision of this Court, therefore, my decision is basically in legal terminology so that I might facilitate that process, if that is sought.

The Constitution reads the Circuit Court shall have original jurisdiction in all matters civil and criminal within the state, not excepted in this Constitution, and not hereafter prohibited by law.

As to the matter now before the Court, I find no prohibition or limitation of this Court's jurisdiction in the Constitution.

As to applicable statutory law we must look to, first of all, Wisconsin Statute 253.03. That statute in broad terms delineates the board powers of the Circuit Court, limiting such powers only when exclusive jurisdiction is given to some other court. Within that same delineation, that statute expresses that, and I quote as to the powers of the Circuit Courts: "they have all the powers, according to the usages of courts of law and equity, necessary to the full and complete jurisdiction of the causes and parties and the full and complete administration of justice."

The nature of the relief requested at this time is equitable in nature. The procedure utilized in seeking that equitable relief is by way of an application for a temporary injunction as controlled by Chapter 268 of the Wisconsin Statutes. A careful reading of that Chapter of the Statutes will indicate that reference is only made to courts of record, judges and court commissioners. There is noticeably absent from that Chapter express authority for administrative agencies granting injunctive relief.

However, the matter at Bar is one which unquestioningly arose out of a labor dispute. More specifically, a labor dispute in the public employment sector. As such, the Court must give due consideration to the provisions of Section 111.70 of the Wisconsin Statutes. That particular statute creates certain procedures to be followed when labor disputes arise in the public employment sector.

Briefly, Section 111.70 enumerates various prohibited practices as well as the power of the Wisconsin Employment Relations Commission in dealing with those prohibited practices. Furthermore, the procedures to be followed by the Wisconsin Employment Relations Commission in relation to those prohibited practices are controlled by Section 111.07 of the Statutes.

Upon a review of the pleadings, testimony and the evidence in this case by way of exhibits I find no prohibited practices as defined in Section 111.70(3) to either be alleged or proved. I can see no basis for jurisdiction in the Wisconsin Employment Relations Commission in the limited issues before this Court.

The issue before the Court is one of constitutional origin, namely due process. While the Wisconsin Employment Relations Commission may concern itself with due process on occasion, it does so in a collateral fashion. However, I do not want to indicate that the Wisconsin Employment Relations Commission does not have jurisdiction in other areas of this particular labor dispute.

As to the principle citations called to the Court's attention by counsel for the defendants the Seebruch case reported in 74 L.R.R.M. 2988, and the Lewis case, Columbia County case number 12456 it must be pointed out, Gentlemen, that each of those cases involved either an alleged unfair labor practice (Lewis) or an alleged prohibited practice (Seebruch). Such is not the case in this situation.

Accordingly, the Court having deemed the limited issue in this case to be one of constitutional due process rights, I specifically find that this Court has jurisdiction to hear the request for injunctive relief.

As to the second issue, whether injunctive relief should

be granted, this Court must indeed, as invited by plaintiff's counsel, look at substance rather than form. The substance of this matter is and I specifically find:

(1) The plaintiffs and members of their class are teachers who signed individual 1973-74 contracts with the Hortonville Joint School District No. 1.

(2) The 1973-74 individual contracts incorporated by reference the 1972-73 school year master collective bargaining agreement.

(3) The plaintiffs and members of their class have engaged in a strike against the Hortonville Joint School District No. 1 since March 8, 1974, and up to the present.

(4) Each of the plaintiffs and members of their class received notices of termination of their employment as teachers for the aforesaid school district, effective April 2, 1974.

Now I want to clarify that so there is no misunderstanding. I am not finding whether or not those terminations are valid or invalid. I am making no such judgment.

The thrust of the plaintiffs' position has been throughout these proceedings that they are on strike with justification. That such justification is in brief a conspiracy by the defendants to fire certain of the plaintiffs and members of their class by utilizing methods which were calculated to provoke the present strike. Such a strike, as viewed by the plaintiffs, would enable the defendants to hire at random from the ranks once the strike had begun and once their employment was terminated.

This Court has taken the position that the reasons for

the strike as well as the reasons for the alleged discharge are not relevant to the scope of this proceeding. This Court has, therefore, so limited the presentation of evidence in those respects.

Counsel for the plaintiffs has cited a number of cases holding that certain strikes are justifiable in spite of existing collective bargaining agreements which provide to the contrary. Those cases, however, are not applicable to the public sector in the State of Wisconsin. The law in Wisconsin on this point is clear and succinct as set forth in Wisconsin Statute 111.70 (4) (1) and I quote: "Nothing contained in this subchapter shall constitute a grant of the right to strike by any county or municipal employee and such strikes are hereby expressly prohibited.

That statute does not say nor has any Court in this state interpreted that statute to provide that strikes are expressly prohibited except when there is just cause. The legislative policy on this point is clear. Section 111.01(4) of the Wisconsin Statutes provides: "It is the policy of this state in order to preserve and promote the interests of the public, the employe, and the employer, alike, to establish standards of fair conduct in employment relations and to provide a convenient, expeditious and impartial tribunal by which these interests may have their respective rights and obligations adjudicated. While limiting individual and group rights of aggression and defense, the state substitutes processes of justice for the more primitive methods of trial by combat."

It is the further argument of the plaintiffs that the chain of cause and effect in this case is substantially as follows: That the defendants committed certain acts; those acts of defendants caused the strike: the strike caused the discharge and termination of employment notices to be sent on April 2nd, 1974. But, as I previously indicated, Wisconsin law does not give validity to the provocation-justified strike theory. Therefore, one must look to the strike, the termination of the employment notices chain of cause and effect.

Although the case of David Adler and Sons Company vs. Maglio, 200 Wisconsin 153 is prior to recent deve'opments and statutes in the area of labor law, the principles of that case are equitable in nature and they hold true today as they did back in 1921. The Court said in part in that case on page 159: ". . . the portals of equity are closed to those who come seeking relief from the consequences which naturally flow from deliberate wrongs committed by the applicant for relief. 'A court of equity acts only when and as conscience commands, and if the conduct of the plaintiff be offensive to the dictates of natural justice, then, whatever use he may make of them in a court of law, he will be held remediless in a court of equity.' "

There is ample testimony in the record that the plaintiffs discussed the possible consequences of their strike, one of those consequences being potential termination of their employment.

This Court can only conclude that the plaintiffs have deliberately caused their present predicament and that therefore, they stand before this Court this evening with what is legally termed "unclean hands".

As to the showing of possible success by the plaintiffs in the underlying lawsuit, let it suffice to say that if that was the only issue to be considered in granting injunctive relief, this Court would not deny such relief.

However, the possible success of ultimately prevailing is not the sole consideration. The second consideration is whether irreparable damage will be sustained by the plaintiffs as a result of any of the defendants' acts.

Irreparable damage means damage which either cannot be corrected at a future date or if corrected at a future date it will be too late to accomplish justice. In essence, irreparable damage is that for which no adequate remedy can be found to rectify.

The evidence in this case has proved that each of the plaintiffs who tesified are suffering and will continue to suffer economic loss as a result of the termination notices which were sent to them April 2, 1974. Surely the job market for teachers at this time of the year is poor and there is obviously little hope that the picture will be better in the near future. But the fact remains that between March 18 and at least until April 2, 1974, the plaintiffs deliberately chose to sustain such economic loss, as well as any resulting consequences. When the testimony closed this afternoon it was apparent that the strike still continues. The plaintiffs still choose by their own doing a route that is obviously causing economic loss, economic hardship. This, however, is not like a garnishment action which was mentioned in the course of argument. In a garnishment action the debtor is deprived of his property as the result of a sudden seizure of his property, a decision in which he has no choice. The same cannot be said here. The plaintiffs had a choice and they have made it.

The Court is also of the opinion that in spite of the temporary economic loss, temporary economic hardships the plaintiffs do have adequate remedies by which they may refer such financial losses if they prevail in any

of those remedies. There is a grievance procedure available under their contract for the 1973-74 school year. There are possible procedures before the Wisconsin Employment Relations Commission. There are possible suits for breach of contract, and there is already the underlying lawsuit in this case.

While the decision is difficult for the Court to make, as much as the Court can sympathize with the plaintiffs as well as the defendants in this most difficult decision, the Court must and does hereby for the reasons afore stated deny the plaintiffs application for a temporary injunction.

Counsel for the defendants are directed to draft an appropriate order to that effect within five days, the same to be furnished to counsel for the plaintiffs for approval as to form.

Thank you, we stand adjourned. (6:59 p.m.)

STATE OF WISCONSIN OUTAGAMIE COUNTY
CIRCUIT COURT

[Caption omitted in printing]

ORDER DENYING APPLICATION FOR TEMPORARY INJUNCTION

The captioned matter having come on for hearing on the Plaintiff's application for temporary injunctive relief to be effective pending final disposition of this action; and hearing thereon having been held on April 9, 10 and 11, 1974; and thereafter the Court having heard oral arguments of both parties; and the Court having made Findings of Fact and Conclusions of Law;

NOW THEREFORE, IT IS ORDERED, that Plaintiff's application for a temporary injunction be, and the same is hereby, DENIED.

Dated this 23rd day of April, 1974.

BY THE COURT:

/s/ ALLAN J. DEEHR
Circuit Judge

[Approval as to form omitted in printing]

STATE OF WISCONSIN OUTAGAMIE COUNTY
CIRCUIT COURT

[Caption omitted in printing]

ANSWER

COME NOW The defendants named above, by their attorneys, Melli, Shiels, Walker & Pease, S.C., and as and for an Answer to the Complaint herein, admit, deny and allege as follows:

1. Deny information sufficient to form a belief as to the truth of the allegations of paragraph 1 and 2 of the Complaint and puts plaintiffs to their proof thereof.

2. As to paragraph 3, Defendants admit the material allegations except Defendants deny that the offices of the District or the Board or the Superintendent or Gene Riedl are located at 211 East Union Street, Hortonville, Wisconsin, and allege that such offices are located at 246 North Olk Street, Hortonville, Wisconsin; deny

that Merlin Plamann resides at 4510 North McArthy Road, Appleton, Wisconsin; and allege that Merlin Plamann resides at 4510 North McCarthy Road, Appleton, Wisconsin;

3. As to paragraph 4, Defendants allege that on March 18, 1974, the named plaintiffs and all but two of the employees then employed by the District and represented by the Hortonville Education Association, engaged in a strike against the District contrary to prohibition thereof in sec. 111.70 (4) (L), Wisconsin Statutes; deny that all teachers represented by the Association were served notices of scheduled hearings; allege that such notices were served on and hearings scheduled for only those individuals who engaged in the unlawful strike activity; deny that the timing of said notices denied the plaintiffs or others who received similar notices a fair opportunity to consult with an attorney or to prepare a defense.

4. Answering paragraph 5, Defendants deny that at the beginning of the appearances before the Board the plaintiffs and other teachers requested opportunity to examine adversary management personnel relative to the charges against them.

5. As to paragraph 7, Defendants allege that each officer of the Association was informed of his or her hearing scheduled before the Board; deny that the allegations of paragraph 7 are relevant to any issue or matter over which the Court has jurisdiction; upon information and belief, deny that the Association represented the individual named plaintiffs or other teachers in the scheduled hearings before the Board.

6. As to paragraph 8, deny it was the intention of

the Board or its administrators or agents to hire permanent replacements for all discharged teachers represented by the Association; admit that the Board and its administrators and agents have taken steps to recruit and hire, and have in fact done so, teaching personnel necessary for the conduct of Defendants statutory obligations.

7. Deny each and every allegation of paragraphs 9 and 10.

8. Deny information sufficient to form a belief as to the truth of the allegations of paragraph 11, except defendants admit that documents purporting to be grievances have been filed with the Board by each discharged and not rehired teacher.

9. Deny each and every material allegation of paragraph 12.

AFFIRMATIVE DEFENSES

And further answering the Complaint, Defendants allege as affirmative defenses:

10. That each named plaintiff and other teachers represented thereby quit his or her employment by engaging in an unlawful strike on March 18, 1974.

11. That plaintiffs and all members of the class represented by plaintiffs waived any "due process" rights they had or may have had to and in the hearings scheduled by the Defendant Board of Education, in that:

a. Said persons quit their employment and were not entitled to any pre-termination hearing;

b. Said persons were not entitled, under any "due

process" provision or otherwise, to a full hearing with and by the Board of Education prior to notification of action terminating employment status;

c. Said persons refused to answer questions which the Board sought to ask to ascertain whether alleged unlawful unprotected activity was engaged in and if so, whether there existed circumstances for Board consideration in respect thereto;

d. Said persons, through counsel, did not request additional time for preparation of "defense," and agreed to proceed with said matters on April 1, 1974.

12. That the Court lacks jurisdiction over the subject matter of the Complaint.

WHEREFORE, Defendants pray that this Court enter judgment dismissing the Complaint and for their costs and disbursements.

MELLI, SHIELS, WALKER & PEASE, S.C.
Attorneys for Defendants

[Verifications omitted in printing]

STATE OF WISCONSIN IN CIRCUIT COURT
OUTAGAMIE COUNTY

[Caption omitted in printing]

PRE-TRIAL ORDER

Whereas the above captioned matter came on for pretrial on May 31, 1974, and the plaintiffs having orally requested pursuant to Section 269.44 of the Wisconsin Statutes leave of the Court to file an amended complaint,

and the defendant having orally requested pursuant to Section 269.45 of the Wisconsin Statutes an extension of time within which to move for summary judgment,

Now, Therefore, on the Court's own motion

IT IS HEREBY ORDERED that the plaintiffs be and hereby are granted leave to file an amended complaint in the above captioned matter within five days from the date of this order.

IT IS FURTHER ORDERED that the time for moving for summary judgment be and is hereby extended until the expiration of twelve days after the signing of this order.

IT IS FURTHER ORDERED that in the event this matter must be tried, trial shall commence on Monday, July 15, 1974, unless counsel shall have timely moved for a delay in the commencement of trial.

Dated this 3rd Day of June, 1974

BY THE COURT

/s/ ALLAN J. DEEHR
Circuit Judge

STATE OF WISCONSIN OUTAGAMIE COUNTY
CIRCUIT COURT

[Caption omitted in printing]

AMENDED COMPLAINT

COME NOW the plaintiffs above-named, by their attorneys, Lawton & Cates, and as and for causes of action

against the above-named defendants, hereby amend the original complaint and allege and show to the Court as follows:

PARTIES

1. Plaintiff, Hortonville Education Association (hereinafter "Association"), is a labor organization as defined by Section 111.70(1)(j) of the Wisconsin Statutes. It is the collective bargaining representative of all teachers employed by the Hortonville Joint School District No. 1. Michael Wisnoski is the President of the Association.

Plaintiff Michael Wisnoski is a public school teacher. He resides with his wife and three (3) children at Route 1, North Road, Appleton, Wisconsin. At all times material hereto he has been employed as a junior high school teacher by the Hortonville Joint School District No. 1, and he has been the President of the Association.

Plaintiff Rose Marie Olson is a public school teacher. She resides with her husband and two (2) chidren at 509 West Cedar Street, Hortonville, Wisconsin. At all times material hereto, she has been employed as a teacher by the Hortonville Joint School District No. 1.

Plaintiff Thomas Nadeau is a public school teacher. He resides with his wife and children at Route 1, Grandview Road, Hortonville, Wisconsin. At all times material hereto, he has been employed as a high school teacher by the Hortonville Joint School District No. 1.

Plaintiff Judy Murphy is a public school teacher. She resides with her children at 728 Chestnut Street, Neenah, Wisconsin. At all times material hereto, she has been employed as a guidance counselor by the Hortonville Joint School District No. 1.

Plaintiff Russel Lichte is a public school teacher. He resides with his wife at 2300 Woodrow Court, Appleton, Wisconsin. At all times material hereto he has been employed as a high school, junior high school, and elementary school teacher by the Hortonville Joint School District No. 1.

Plaintiff Ronald Hammond is a public school teacher. He resides with his three children at 518 Whitney Street, Kaukauna, Wisconsin. At all times material hereto, he has been employed as a junior high school teacher by the Hortonville Joint School District No. 1.

2. The plaintiffs individually named in paragraph 1 of this Complaint are representative of all teachers employed by the District whose employments the Board has acted to terminate. Said plaintiffs represent all other Hortonville teachers so situated, and the issues set forth in this Complaint are of common interest to all teachers in said class. Said class of teachers is too numerous, and it is impractical, to bring all of them before this Court. The named plaintiffs fairly and fully will represent all of the interests of all other teachers situated similary to the individually-named plaintiffs.

3. Defendant Hortonville Joint School District No. 1 (hereinafter "District") is a public school district organized under the laws of the State of Wisconsin. The District is a municipal employer as defined at Section 111.70(1)(2), of the Wisconsin Statutes. It has its offices at 246 North Olk Street, Hortonville, Wisconsin. Defendant Board of Education of the District (hereinafter "Board") is a public body charged under Wisconsin law with the management of the District. It has its offices at 246 North Olk

Street, Hortonville, Wisconsin. The duly-elected and acting President of the Board is Roger Weihing, who resides at Route 1, Appleton, Wisconsin.

Defendant Marvin Obry is the Superintendent of the District and agent of the Board. He has his office at 211 East Union Street, Hortonville, Wisconsin. Defendant Robert Kohls is the Hortonville High School Principal and agent of the Board. He has his office at 246 North Olk Street, Hortonville, Wisconsin. Defendant Eugene Riedl is the Hortonville Junior High School and Elementary Schools Principal and agent of the Board. He has his office at 211 East Union Street, Hortonville, Wisconsin.

The remaining individually-named defendants all are members of the Board. Robert Hauk, the Clerk of the Board, resides at 111 East Cedar Street, Hortonville, Wisconsin. Jean Meads resides at Route 1, Hortonville, Wisconsin. Floyd Meyer resides at Route 2, Appleton, Wisconsin. Merlin Plamann resides at 4510 North McCarthy Road, Appleton, Wisconsin. Victor Schroth resides at Route 1, Hortonville, Wisconsin. Ronald Suprise resides at Route 2, Hortonville, Wisconsin.

FIRST CAUSE OF ACTION

As and for a first cause of action, plaintiffs allege and show to the Court as follows:

4. The allegations set forth in this amended complaint, paragraphs 1 through 3, are hereby incorporated by reference to have the same force and effect as though here fully set forth.

5. Immediately prior to, during and immediately following the weekend of March 30 and 31, 1974, the indi-

vidually-named plaintiffs, and all other teachers represented by the Association, were served notices that the Board had scheduled hearings for each and every one of them, at twenty-minute intervals, commencing Monday Morning, April 1, 1974, through and until late on Wednesday evening, April 3, 1974. These notices notified the employees that the Board was considering taking action against their then current teaching contracts. Said notices failed to afford the plaintiffs, and others who received similar notices, a fair or adequate opportunity to consult with an attorney or to prepare for a hearing or to defend against the reasons that the Board might consider for the termination of their employment.

6. On Monday, April 1, 1974, the plaintiffs and other similarly situated teachers appeared before the Board and objected to the lack of fair and adequate notice of and opportunity to prepare for the scheduled hearings, and objected to the Board acting as the decision-maker in their cases, because of its involvement in the very circumstances which gave rise to the Board's consideration of the termination of their employments. Plaintiffs and other teachers requested the opportunity to prevent evidence in their defense, in mitigation of reasons the Board might consider grounds for the termination of their employments. At the beginning of said appearance before the Board, the plaintiffs and the other teachers further requested the opportunity to examine adversary management personnel relative to the charges against them. All of the objections and requests made by the plaintiffs and by other teachers were denied by the Board, which acted on the advice of its attorney. The Board's attorney acted both as counsel to the Board and as prosecutor, presenting the charges and evidence against the plaintiffs.

No evidence was adduced at the hearings against any of the plaintiffs or other teachers who appeared before the Board.

7. By letters dated April 2, 1974, the plaintiffs and on information and belief, almost all other teachers employed by the District, were notified by the Board that the Board had acted to terminate their employment, both under the current teaching contracts, and under the teaching contracts they had signed for the 1974-75 school year. By the same letters, the plaintiffs and other teachers were invited individually to reapply for employment with the District. At no time have the plaintiffs, or any other teachers similarly situated, ever been informed of the evidentiary basis for the Board's decision to terminate their employment both this year and for the 1974-75 school year.

8. The Association, which represents the plaintiffs and all other teachers employed by the district, was not informed of the hearings scheduled by and before the Board for April 1, 2 and 3, 1974. The Association also was not given any advance notification of the Board's decision to terminate the employment of the plaintiffs and other teachers represented by the Association.

9. The aforesaid acts of the Board, set forth at paragraphs 5, 6, 7 and 8 herein, done by the Board and their administrators and agents, all have been done under color of state law, intentionally, maliciously, capriciously and arbitrarily, and in bad faith. The named defendants, have done said acts acting individually and as part of conspiracy to deny the plaintiffs and others similarly situated their rights to procedural due process of law as guaranteed

under the Fourteenth Amendment to the United States Constitution and Article I of the Wisconsin Constitution. Said acts by the Board and their administrators and agents have been done for the purpose of and have resulted in the plaintiffs and other teachers similarly situated being denied employment with the District. The Board's actions, and the actions of its administrators and agents, have denied to the plaintiffs and others similarly situated the liberty and property interests secured to them under the United States Constitution, and have caused substantial injury to the plaintiffs and others similarly situated in their personal and professional reputations and their abilities to secure employment in their teaching profession. The actions of the Board and its administrators and agents have caused the plaintiffs, and other similarly situated, great emotional upset and distress, and have caused them to incur financial losses.

10. The actions of the Board and its administrators and agents, which are set forth at paragraphs 5, 6, 7, 8 and 9 herein, and each and every one of said actions both separately and in toto, have denied to the plaintiffs, and other teachers similarly situated, procedural due process of law as guaranteed under the Fourteenth Amendment of the United States Constitution and Article I of the Wisconsin Constitution. The actions of the Board, and its administrators and agents, to date, have continued to deny to the plaintiffs and others similarly situated the rights secured to them under the Constitutions of the United States and of Wisconsin, all to the irreparable harm of the plaintiffs and others similarly situated.

SECOND CAUSE OF ACTION

As and for a second cause of action, the plaintiffs allege and show to the Court as follows:

11. The alleagations set forth in paragraphs 1 through 8 herein, hereby are incorporated by reference to have the same force and effect as if fully set forth at this point.

12. Certain teachers who appeared before the Board without representation by the Association, have been treated differently from the employees who appeared before the Board represented by the Association. Said teachers who appeared before the Board without representation were offered employment opportunities and conditions of employment not offered to the teachers who were represented by the Association before the Board.

13. The conduct of the Board, its administrators and agents, which is set forth at paragraph 12 herein, constitutes a disparate and discriminatory treatment of the teachers who appeared before the Board. Said conduct by the Board, its administrators and agents, constitutes a violation of the equal protection of the law requirements of the Fourteenth Amendment to the United States Constitution and of the Wisconsin Consitution.

THIRD CAUSE OF ACTION

As and for a third cause of action, the plaintiffs allege and show to the Court as follows:

14. The allegations set forth in paragraphs 1 through 8 of this Amended Complaint hereby are incorporated by reference to have the same force and effect as if fully set forth at this point.

15. On April 2, 1974, the Board, its administrators and agents, met and held a special meeting at which they considered, decided and acted to terminate the employments of the plaintiffs and other teachers similarly situated. No notice of said special meeting was ever given to the plaintiffs, or any other teachers similarly situated nor to the public.

16. The aforesaid special meeting held on April 2, 1974, at which the plaintiffs and other similarly situated were deprived of liberty and property interests in their continued employments, was a closed meeting and in violation of Section 66.77, Wis. Stat. The actions taken by the Board, its administrators and agents, against the plaintiffs and other teachers similarly situated at the unlawful closed meeting are null and void, and in violation of the statutes of Wisconsin.

FOURTH CAUSE OF ACTION

As and for a fourth cause of action, the plaintiffs allege and show to the Court as follows:

17. The allegations set forth in paragraphs 1 through 3 of this Amended Complaint hereby are incorporated by reference to have the same force and effect as if fully set forth herein.

18. On information and belief, the Board, its administrators and agents, have hired, and are hiring permanent replacement for the plaintiffs and other teachers similarly situated, for both the 1973-1974 and 1974-1975 school years. It is the intention of the Board, its administrators and agents to hire permanent replacements for all plaintiffs and others similarly situated.

19. On information and belief, said permanent replacements have been hired, and are being hired, in violation of Sections 118.19, 118.21 and 118.25, Wis. Stat. Said hirings, and the teaching contracts entered into between the Board and the permanent replacements, are in violation of the Wisconsin Statutes, and they are null and void.

WHEREFORE, it is prayed that this Circuit Court enter its order granting judgment for the plaintiffs and others similarly situated:

A. Declaring the aforesaid actions of the Board, its administrators and its agents, to be a denial of constitutionally-secured due process of law, and null and void;

B. Ordering that the discharge of the plaintiffs, and other teachers similarly situated, be set aside, and declared null and void;

C. Enjoining the defendants from recruiting and hiring permanent replacements for the plaintiffs and others similarly situated, until such time as the plaintiffs and others who are similarly situated have been afforded a full and fair hearing that meets the requirements of constitutionally-secured due process of law, concerning their discharges;

D. Ordering the defendants to rescind and revoke any contracts they have made for the premanent replacement of any of the plaintiffs, or any others similarly situated;

E. Ordering the parties mutually to agree upon and select an impartial decision-maker to determine if there was "just cause" for the termination of each of the plaintiffs and other teachers similarly situated.

F. Granting such other and further relief as may be appropriate.

Dated: May 30, 1974.

LAWTON & CATES
/s/ BRUCE F. EHLKE
Attorney for Plaintiffs

[Verifications omitted in printing]

STATE OF WISCONSIN OUTAGAMIE COUNTY

CIRCUIT COURT

[Caption omitted in printing]

ANSWER TO FIRST CAUSE OF ACTION IN AMENDED COMPLAINT AND DEMURRER TO STATED SECOND CAUSE OF ACTION, THIRD CAUSE OF ACTION AND FOURTH CAUSE OF ACTION

ANSWER TO THE FIRST CAUSE OF ACTION IN THE AMENDED COMPLAINT

COME NOW THE DEFENDANTS named above, by their attorneys, Melli, Shiels, Walker & Pease, S.C., and as and for an Answer to First Cause of Action in Amended Complaint herein, admit, deny and allege as follows:

1. Deny that plaintiff Hortonville Education Association is a labor organization as defined by Section 111.70 (1) (j), Wisconsin Statutes; deny that Hortonville Education Association is the collective bargaining representative of all teachers employed by defendant Hortonville Joint School District No. 1; deny that any or all of the individual

named plaintiffs, Michael Wisnoski, Rose Marie Olson, Thomas Nadeau, Judy Murphy, Russel Lichte and Ronald Hammond have, at all times material, been employed as teachers by the Hortonville Joint School District No. 1; and Defendants deny knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 1 and of paragraph 2 of the Amended Complaint, and puts plaintiffs to their proof thereof.

2. As to paragraph 3 of the Amended Complaint, Defendants admit the material allegations except Defendants deny that the offices of Superintendent Marvin Obry or principal Gene Reidl are located at 211 East Union Street, and allege that such offices are located at 246 North Olk Street, Hortonville, Wisconsin.

3. As to paragraph 4 of the Amended Complaint, Defendants reallege paragraphs 1 and 2 of this Answer.

4. As to paragraph 5 of the Amended Complaint, Defendants deny that all teachers represented by the Association were served with notice of hearing; allege that on March 18, 1974, the named plaintiffs and all other teachers then employed by the District, and for whom the Hortonville Education Association had been the collective bargaining representative, engaged in a strike against the District contrary to prohibition thereof in sec. 111.-70(4)(1), Wisconsin Statutes, and in breach of their individual teaching contracts for the 1973-74 school year; allege that two (2) of said teachers returned to the District's classrooms on Friday, March 22, 1974 and said teachers have continuously since that date remained in the District's employ, and were not served with notice of hearing; deny that the notices served on the individual striking

employees notified such employees that the Board was considering taking action against their then current teaching contracts; allege that such notices advised the individual striking employees that the alleged conduct therein set forth, if true, subjected such employee to disciplinary action by the Board, including possible termination of employment contract, and further advised such employees that after the hearing thereby scheduled, the Board would notify the employee of what disciplinary action, if any, the Board had determined appropriate; deny that said notices denied plaintiffs, and others who received such notice, a fair opportunity to consult with an attorney or to prepare for a hearing or to defend against the reasons that the Board might consider for the termination of their employment.

5. As to paragraph 6 of the Amended Complaint, Defendants deny that plaintiffs and other teachers at any time on April 1, 1974 requested the opportunity to examine adversary management personnel relative to the charges against plaintiffs and other teachers; allege that plaintiffs' counsel stated that plaintiffs wished to present evidence regarding the bargaining between the parties and had some questions of some of the Board members; deny that all of the objections and requests made by the plaintiffs and other teachers were denied by the Board; allege that through counsel plaintiffs and other teachers admitted the conduct alleged in the notice of hearing served individually upon each of them; allege that the matters set forth by counsel for the individual teachers in an offer of proof made at said hearing, if true, was no justification for, and was immaterial to a consideration of the conduct engaged in by plaintiffs and the other teachers represented by plaintiffs in this action.

6. As to paragraph 7, Defendants deny information or knowledge sufficient to form a belief as to whether the plaintiffs and other teachers had signed contracts for the 1974-75 school year on or before April 2, 1974, and puts the plaintiffs to their proof thereof; allege that by letter dated April 2, 1974, the Board of Education notified each teacher that the Board has terminated his/her 1973-74 employment contract with the Hortonville district effective immediately, which action included withdrawal of the offer of employment for the 1974-75 school year and/or termination of such tendered employment contract; allege that said letter of April 2, 1974 advised each such teacher that he/she had been found guilty of the conduct set forth in the notice of hearing, as admitted by counsel for the plaintiffs and other teachers at the hearing on April 1, 1974.

7. As to paragraph 8, Defendants deny that the Hortonville Education Association represents the plaintiffs and all other teachers employed by the District; deny that the Hortonville Education Association was not informed of the hearings scheduled by and before the Board; allege that each officer of the Association was informed of his or her hearing scheduled before the Board; upon information and belief, deny that the Association represented the plaintiffs or other teachers at the time of or in the hearings scheduled before the Board of Education; allege that it is not possible for the Board to give notification of a decision prior to its making a decision.

8. Defendants deny each and every material allegation contained in paragraphs 9 and 10.

DEMURRER TO THE SECOND CAUSE OF ACTION

The above named defendants, by their attorneys, Melli, Shiels, Walker & Pease, S.C., demur to the stated Second Cause of Action on the ground that the stated Second Cause of Action in the Amended Complaint does not state facts sufficient to constitute a cause of action.

DEMURRER TO THE THIRD CAUSE OF ACTION

The above named defendants, by their attorneys, Melli, Shiels, Walker & Pease, S.C., demur to the stated Third Cause of Action on the ground that the stated Third Cause of Action in the Amended Complaint does not state facts sufficient to constitute a cause of action.

DEMURRER TO THE FOURTH CAUSE OF ACTION

The above named defendants, by their attorneys, Melli, Shiels, Walker & Pease, S.C., demur to the stated Fourth Cause of Action on the grounds that there is a defect of parties defendant in that the parties to such contracts are not parties to this lawsuit; and that the stated Fourth Cause of Action in the Amended complaint does not state facts sufficient to constitute a cause of action.

AFFIRMATIVE DEFENSES

And further answering the First Cause of Action in the Amended Complaint, Defendants allege as affirmative defenses:

1. That each plaintiff and other teachers represented thereby quit his or her employment by engaging in an unlawful strike on March 18, 1974.

2. That plaintiffs and all members of the class represented by plaintiffs waived any due process rights they had or may have had to and in the hearings scheduled by the Defendant Board of Education, in that:

a. Said persons quit their employment and were not entitled to any pre-termination hearing;

b. Said persons were not entitled, under any "due process" provision or otherwise, to a hearing with and by the Board of Education prior to notification of action terminating employment status;

c. Said persons refused to answer questions which the Board sought to ask to ascertain whether alleged unlawful unprotected activity was engaged in and if so, whether there existed relevant circumstances for Board consideration in respect thereto;

d. Said persons, through counsel, did not request additional time for preparation and agreed to proceed with said matters on April 1, 1974.

3. That the Hortonville Education Association is not a proper party plaintiff to the action.

WHEREFORE, Defendants pray that this Court enter judgment dismissing the Amended Complaint and for their costs and disbursements.

MELLI, SHIELS, WALKER & PEASE, S.C.
Attorneys for Defendants
By: /s/ JAMES K. RUHLY
119 Monona Avenue
Madison, Wisconsin 53703

[Verifications omitted in printing]

STATE OF WISCONSIN OUTAGAMIE COUNTY
CIRCUIT COURT

[Caption omitted in printing]

NOTICE OF MOTION

TO: MELLI, SHIELS, WALKER & PEASE, S.C.
119 Monona Avenue
Madison, Wisconsin 53703
Attorneys For Defendants

PLEASE TAKE NOTICE that Plaintiffs, by their attorneys, LAWTON & CATES, will move the Court on the 27th day of June, 1974, at the Outagamie County Court House, before the Honorable Allen J. Deehr, at 3:00 o'clock P.M., or as soon thereafter as counsel can be heard for an order overruling Defendants' Demurrers.

Dated at Madison, Wisconsin, this 21st day of June, 1974.

LAWTON & CATES
/s/ BRUCE F. EHLKE
110 East Main Street
Madison, Wisconsin 53703
Attorneys for Plaintiffs

[Caption omitted in printing]

MOTION

TO: MELLI, SHIELS, WALKER & PEASE, S.C.
119 Monona Avenue
Madison, Wisconsin 53703
Attorneys For Defendants

COME NOW the Plaintiffs, by their attorneys, LAWTON & CATES, and move the Court for an order overruling Defendants' Demurrers; said Motion to be heard at the time and place indicated in the attached Notice.

Dated: June 21, 1974.

LAWTON & CATES
/s/ BRUCE F. EHLKE
110 East Main Street
Madison, Wisconsin 53703
Attorneys For Plaintiffs

STATE OF WISCONSIN OUTAGAMIE COUNTY
CIRCUIT COURT

[Caption omitted in printing]

NOTICE OF MOTION FOR SUMMARY JUDGMENT

TO: LAWTON & CATES
Attorneys for Plaintiffs
110 East Main Street
Madison, Wisconsin 53703
Attention: Bruce Ehlke, Esq.

PLEASE TAKE NOTICE That the undersigned as attorney for the defendants in the above entitled action, hereby moves said court for summary judgment in favor of defendants and against the plaintiffs, dismissing the Amended Complaint, and for costs and disbursements of this action. Such motion will be heard on the 27th day of June, 1974, at 3:00 o'clock P.M., or as soon thereafter as counsel can be heard, and at the courtroom of the court above named in the City of Appleton. Said motion is based on the Amended Complaint, Answer and the record in this

action, and the affidavit of Roger Weihing, a true and correct copy of which is attached hereto.

Dated this 12th day of June, 1974.

/s/ JACK D. WALKER
MELLI, SHIELS, WALKER & PEASE, S.C.
119 Monona Avenue
Madison, Wisconsin 53703
Attorneys for Defendant

STATE OF WISCONSIN OUTAGAMIE COUNTY

CIRCUIT COURT

[Caption omitted in printing]

AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

STATE OF WISCONSIN

ss.

COUNTY OF OUTAGAMIE

Roger Weihing, being first duly sworn, on oath deposes and says:

1. That he is an adult resident of Outagamie County, State of Wisconsin, residing at Route 1, Appleton, Wisconsin; that he is now, and has been since April, 1969, a member of the Board of Education for Hortonville Joint School District No. 1, Village of Hortonville, et al.; that he is now, and has been since January, 1973, president of said Board of Education.

2. That commencing Monday, March 18, 1974, the teaching employees then employed by said school district

engaged in an unlawful strike against the defendant school district; that said strike began after agreement had been reached between the parties on the terms for a collective bargaining agreement for the 1973-74 school year, and prior to completion of negotiations for a collective bargaining agreement for the 1974-75 school year, to commence in late August, 1974.

3. That prior to commencement of said unlawful strike, and commencing on or about January 24th, 1974, the teaching employees then employed by said school district engaged in a "mini-strike" against said school district; that said mini-strike consisted of said teaching employees engaging in informational picketing prior to the commencement of the school day, and a refusal to perform assigned, contracted responsibilities after 4:00 P.M. on school days; that said mini-strike terminated on or about January 30, 1974, and thereafter agreement was reached on the terms for a 1973-74 collective bargaining agreement.

4. That on March 20, 1974, after commencement of the unlawful strike, the school district superintendent, Marvin Obry, at the direction of the Board of Education, informed each teacher by letter that the school board was proceeding with plans to get the children back in the schools; said letter invited the teacher employees then on strike to be a part of said plans; that thereafter several of the teaching employees then on strike returned to the school on Friday, March 22, 1974.

5. That on March 23, 1974, said school district superintendent, at the direction of the Board of Education, informed each teacher by letter that teachers who desired to

resume work were invited to contact the superintendent's office during regular working hours; that none of the 86 teaching employees then on strike contacted the superintendent's office thereafter; that said letter also reminded the teachers that strikes by public employees, including teachers, were expressly prohibited by Wisconsin law, and that the school board "can not and will not condone unlawful activity" by its employees; and that a copy of said letter is attached hereto as Exhibit "A" and is incorporated herein as though set forth in full herein.

6. That following two in-service training days on Friday, March 22, 1974, and Monday, March 25, 1974, the school district conducted classes for most of the students in the district on Tuesday, March 26, 1974, and Wednesday, March 27, 1974, with the use of substitute teachers; that plans to conduct school on Thursday, March 28, 1974, had to be called off because of inclement weather.

7. That a special board meeting was held on Thursday morning, March 28, 1974, attended by and consented to by all board members; that at said meeting the board of education determined that other alternative avenues of operating the schools in the district would be further explored in order that the schools in the district be returned to normal as soon as possible.

8. That a special school board meeting was held on Friday, March 29, 1974, attended by and consented to by all board members; that also present was attorney James K. Ruhly, of the Melli, Shiels, Walker & Pease, S.C., law firm of Madison, Wisconsin; that at said meeting it was determined to schedule disciplinary hearings for each individual teacher who had been and was then engaged in the unlawful work stoppage, commencing at 9:00

o'clock in the forenoon on Monday, April 1, 1974; that notices of such scheduled individual teacher hearings addressed to each such individual teacher were prepared by the school administration at the direction of the School Board; and that a copy of such notice is attached hereto and marked as Exhibit "B".

9. That said notices were delivered by the Board of Education and its agents to the Outagamie County Sheriff's Department on Friday, March 29, 1974 with a request that service of same be made that day or as soon thereafter as the Sheriff's Department would be able to serve same; that attached hereto and marked Exhibit "C" is a compilation of the date that said notices were served on each individual teacher, and the date that the hearing for said teacher was scheduled by the Board of Education.

10. That at 9:00 o'clock in the forenoon on April 1, 1974, the Board of Education convened in the High School library to begin the scheduled individual disciplinary hearings; that at said time, Mr. Donald Dickinson, a professional negotiator and field consultant employed by the Wisconsin Education Association Council, the state organization with which the Hortonville Education Association is affiliated, informed the Board of Education that the individual teacher scheduled for a hearing at 9:00 A.M. on April 1, 1974, was not prepared to proceed because said teacher's legal counsel, Mr. Bruce Ehlke, was not then present in the hearing room; that the individual teacher scheduled for a hearing at 9:00 A.M. that date, was John Amburgy; that at 9:20 A.M. on April 1, 1974, the individual teacher scheduled for a hearing at that time likewise advised the Board that he was not prepared to proceed because his legal counsel, Mr. Bruce Ehlke, had

not yet arrived at the hearing room; that the individual teacher scheduled for a hearing at 9:20 A.M. that date was James Olson; that at 9:40 A.M. on April 1, 1974, the individual teacher scheduled for a hearing at that time advised the Board that he was not prepared to proceed because his legal counsel, Mr. Bruce Ehlke, had not yet arrived at the hearing room; that the individual teacher scheduled for a hearing at 9:40 A.M. that date was Russell Hildebrand; that in each of the foregoing situations the Board of Education postponed further proceedings because of the individual teacher's request to not proceed until Attorney Ehlke arrived; that Attorney Bruce Ehlke arrived at the hearing room at approximately 9:45 A.M. on April 1, 1974; that thereafter the Board of Education attempted to conduct individual hearings for the teachers scheduled for hearings that day; that all teachers scheduled for hearings on Monday, April 1, 1974, were present at the hearing room that day through the termination of the proceedings as hereinafter set forth; that all but five of the teachers scheduled for hearings on April 2 and 3, 1974, were also present in the hearing room on April 1, 1974, at all material times; that in the presence of said teachers, Attorney Bruce Ehlke represented to the Board of Education that the individual teachers would not respond to questions asked of them by the Board of Education and its agents including its counsel, James Ruhly; that Attorney Ehlke asserted to the Board of Education that the individual teachers scheduled for hearings on Monday, April 1, 1974, had not received sufficient notice of the hearings and were therefore not able to prepare a defense; that the Board of Education, through counsel, on several occasions during the proceedings on Monday,

April 1st, 1974, requested that Mr. Ehlke be more specific in terms of the amount of time that his clients requested in order to prepare a defense to the allegations contained in the individual notice of hearing; that Attorney Ehlke failed and refused to respond to Board counsel's request; that Attorney Ehlke on several occasions requested that the Board adjourn the hearings to permit him to discuss various matters with his clients and each such request was granted by the Board of Education and no further proceedings were held until Mr. Ehlke informed the Board that he and his clients were ready to resume; that Attorney Ehlke stated that all teachers to that time and date served with individual notice of hearing were prepared to proceed that day but said teachers would not respond to questions asked by the Board but would rely upon said Hortonville Education Association to respond on their behalf.

11. That at no time during said proceedings did Attorney Ehlke, or any of the teachers present in the hearing room deny the alleged conduct set forth in the individual notices theretofore served upon the individual teachers; that Attorney Ehlke stated that the factual circumstances present in this matter were as much within the Board's knowledge as within the teachers' knowledge; that Attorney Ehlke stated that each of the individual teachers who had been served with notice of hearing had engaged in the same conduct, and therefore individual hearings were not necessary; that Attorney Ehlke stated that his clients did not wish to have the hearings set for a reconvened or future date; that Attorney Ehlke advised the Board that his clients understood, after consultation with him, that if they refused to answer questions, the Board

could conclude they were engaged in a strike; that Attorney Ehlke asserted to the Board that the defense which the Hortonville Education Association proposed to demonstrate to the Board, by calling some of the Board members individually and asking questions of them, was that the unlawful collective action engaged in by the teachers since March 18, 1974, had been provoked by the Board of Education; the Board of Education, on the advice of its counsel, refused to hear said evidence, but did permit Attorney Ehlke to make an offer of proof which Attorney Ehlke thereafter did.

12. A complete copy of the transcript prepared by a stenographic reporter present at the proceedings on April 1, 1974 has been admitted into evidence in this proceeding as Exhibit No. 7 in the hearing for temporary injunctive relief held on April 9, 10 and 11, 1974, before the Honorable Allan J. Deehr.

13. That thereafter, on Monday afternoon, April 1, 1974, one of the teachers served with Notice of Hearing, Ms. Tonia Stamborski, who had not appeared on the morning of April 1, 1974, contacted a member of the Board of Education via the telephone and requested that her hearing be scheduled for that day instead of April 2, 1974 the day scheduled by the Board of Education; that the Board of Education consented to the rescheduling of said hearing as requested by said teacher; that thereafter said teacher appeared before the Board of Education on Monday afternoon, April 1, 1974, and had her hearing on the conduct alleged in the notice of hearing; that a complete transcript of said hearing prepared by a stenographic reporter present at said hearing has been admitted into evidence in this proceeding as Exhibit No. 9 in the hearing

for temporary injunctive relief held on April 9, 10, and 11, 1974, before the Honorable Allan J. Deehr.

14. That on Tuesday, April 2nd, 1974, pursuant to agreements made between Board counsel James Ruhly and Attorney Bruce Ehlke, hearings were held by the Board of Education for four teachers who had been served with notice of hearing since Monday morning, April 1, 1974; that said four teachers appeared for their hearings by their counsel, Attorney Bruce Ehlke; that Attorney Ehlke stated to the Board of Education that said four teachers were ready to proceed with their hearing, but they did not wish to have individual hearings, that they wished that their employment "be considered in the same boat as all other employees"; that said teachers did not wish to have a separate hearing with the Board of Education; that said teachers would refuse to answer questions asked of them as had the teachers on the previous day; and that a true and correct copy of the transcript of said proceedings prepared by a stenographic reporter present at said hearing has been previously admitted into evidence in this proceeding as Exhibit 10 in the hearing for temporary injunctive relief held on April 9, 10 and 11, 1974, before the Honorable Allan J. Deehr.

15. That on Tuesday afternoon, April 2, 1974, the Board of Education held a special meeting, all members present and consenting thereto, at which meeting the Board unanimously adopted a resolution terminating the employment of all striking teachers who had not either returned to the schools on March 22, 1974, or had not indicated that they would return to the building and terminate their participation in the unlawful strike against the school district; that said resolution further directed that a

letter of reprimand be sent to, and a copy placed in the personnel file of, Tonia Stamborski; that said resolution further directed that notice of termination of employment be sent to those teachers whose employment had been terminated by the Board of Education; that by said resolution the Board of Education also revoked and/or terminated the offer of employment previously proffered, on or about March 15, 1974, to the individual teachers prior to commencement of the strike action; that a true and correct copy of such resolution, and of the minutes of said board meeting, has been admitted into evidence in this proceeding as Exhibit 12 in the hearing for temporary injunctive relief held on April 9, 10 and 11, 1974, before the Honorable Allan J. Deehr.

16. That pursuant to the resolution described in the paragraph number 15, notice of termination of employment for the remainder of the 1973-74 school year and withdrawal of the offer of employment for the 1974-75 school term and/or termination of such tendered contract, was sent, certified mail, return receipt requested, to each terminated employee; that such notice advised each individual terminated teacher that he or she could apply for further employment with the District if such further employment was desired; that only one such employee, Mr. Thomas Belaire, so applied prior to April 8, 1974; that a copy of the notice of termination sent to each terminated employee has been admitted into evidence in this proceeding as Exhibit 2 in the hearing for temporary injunctive relief before the Honorable Allan J. Deehr.

17. That on April 5, 1974, the Board of Education held a hearing for a teacher who erroneously had been

omitted from the list of striking teachers, to wit: Ms. Margaret Powers; that Ms. Powers appeared at said scheduled hearing with counsel, Attorney Bruce Ehlke; that Attorney Ehlke asserted that Ms. Powers wished to take the same position as previously taken by other striking teachers (except Tonia Stamborski) as stated above; that a transcript of said proceeding was taken but affiant is without knowledge as to whether said transcript has been prepared by the reporter present at that hearing; that at the conclusion of said hearing, the Board of Education held a special meeting, all members present and consenting thereto, and voted unanimously to terminate the employment of Margaret Powers; and that notice of such action was thereafter sent at the Board's direction to said Margaret Powers.

18. That on April 6, 1974, the Board of Education held a special meeting, all members present and consenting thereto, at which meeting the Board of Education voted to hire replacement teachers recommended by the administration to the Board of Education; that contracts were issued to said replacement teachers at the conclusion of the school day on Monday, April 8, 1974, and said contracts were signed by the Board of Education at a special meeting, all members present and consenting thereto, held on Monday evening, April 8, 1974.

19. That the contracts for several replacement teachers not returned by said replacement teachers on April 8, 1974 and therefore not signed by the Board that date, were signed by the Board of Education at a special board meeting, all members present and consenting thereto, on April 15, 1974, and at the Board's regularly scheduled meeting on May 13, 1974.

20. That the schools reopened on April 8, 1974; that classes since that date have been conducted by replacement teachers hired by the Board of Education; that the two teachers who returned to work on March 22, 1974, continued in the District's employ; that Tonia Stamborski returned to the classroom on April 8, 1974; and one of the teachers whose employment had been terminated, the aforesaid Thomas Belaire, applied to the District for employment and was hired by the Board of Education and began teaching on April 8, 1974; that at least prior to April 29, 1974, said Thomas Belaire was the only teacher who applied to the District for employment pursuant to the invitation extended to all terminated teachers by the Board of Education in the notice of termination dated April 2, 1974. (Exhibit 2 in hearing regarding temporary injunctive relief.)

21. The action is without merit.

22. This affidavit is made in support of a Motion for Summary Judgment by the defendants in the above action.

Dated this 20th day of June, 1974.

/s/ ROGER WEIHING

[Subscription omitted in printing]

[EXHIBIT A, WEIHING AFFIDAVIT]

HORTONVILLE COMMUNITY SCHOOLS
246 North Olk Street
Hortonville, Wis. 54944
March 23, 1974

Dear

On Thursday evening, March 21, the negotiating teams for the School Board and Hortonville Education Association met to continue negotiations. At that meeting the Board offered a new proposal, a copy of which is enclosed for your examination. The underlined provisions represent either tentative agreements or Board proposals. The Board proposed a salary schedule for 1974-75 with:

BA base --- $7900
MA base - -$8550

Teachers Retirement Contribution - 4½ %

The Board said to the HEA representatives that it hoped that such proposal would serve as the basis for an agreement. The proposal was not accepted. The HEA questioned whether the maternity leave provision tentatively agreed to conformed to State and Federal guideline. The two committies tentatively agreed to omit all reference to maternity leave in the agreement, and reply on the State and Federal guidelines.

When Thursday's meeting was adjourned, no further meetings were scheduled.

You should know the position of the School Board with respect to salary during a strike. Teachers who work on a scheduled school day will receive full pay for each day they work. Teachers who do not work will not be paid.

If the Board determines to operate schools during the strike, committments will need to be made prior to the conclusion of each day with respect to teaching personnel who will work the following day. Teachers who desire to resume work, are invited to contact the superintendent's office during regular working hours.

The School Board's legal counsel advises us of the following Statutory provisions which we specifically call to your attention. The Wisconsin Statutes, Section 111.70, provide that strikes by municipal employes (including teachers), are expressly prohibited. The School Board can not and will not condone unlawful activity under this Statute.

Wisconsin Statutes, Section 134.03, states in part that: "Any person who by threats, intimidation, force or coercion of any kind shall hinder or prevent any other person from engaging in or continuing in any lawful work or employment, either for himself or as a wage worker, or who shall attempt to so hinder or prevent shall be punished by fine not exceeding $100 or by imprisonment in the county jail not more than 6 months, or by both fine and imprisonment in the discretion of the court."

We regret having to issue this letter, but wanted to make certain that all teachers of the Hortonville School District

are fully informed that under State law, teachers' strikes are expressly prohibited.

Respectfully,

Roger Weihing
Robert Hauk
Merlin Plamann
Floyd Meyer
Victor Schroth
Ronald Suprise
Mrs. Jean Meads
/s/ Marvin Obry
BY Marvin Obry, Superintendent

[EXHIBIT B, WEIHING AFFIDAVIT]
HORTONVILLE COMMUNITY SCHOOLS
246 North Olk Street
Hortonville, Wis. 54944
March 29, 1974

Dear

The Board of Education for the Hortonville Community Schools has been informed by Superintendent Obry that since March 18, 1974:

You have breached your individual employment contract;

You have engaged in an unlawful strike contrary to Wisconsin law.

This alleged conduct, if true, subjects you to disciplinary action by the Board, including termination of your employment contract.

You are hereby notified that the Board of Education has set a hearing on this matter for ————, April ——, 1974, at —— o'clock in the ———— noon, or as soon thereafter as you may be heard, at the high school library, 246 North Olk Street, Hortonville.

At this hearing you will be given the opportunity to present any statement or evidence relevant to this alleged conduct.

Be further advised that after such hearing the Board will notify you in writing of what disciplinary action if any, the Board has determined appropriate.

FOR THE BOARD OF EDUCATION:
Roger Weihing, President

[Exhibit C, Weihing Affidavit]

NAME	(1974) DATE OF SERVICE	DATE (1974) AND TIME OF HEARING
Abendroth, Ruby	March 29	Apr. 1, 10:00 P.M.
Addie, Jerry	April 1	Apr. 3, 8:40 P.M.
Alexander, Gwendoline	April 1	Apr. 3, 9:00 P.M.
Amburgy, John	March 29	Apr. 1, 9:00 A.M.
Anderson, Elaine	April 1	Apr. 2, 7:40 P.M.
Belaire, Thomas	April 1	Apr. 3, 9:00 A.M.
Beyer, Ethel	March 30	Apr. 2, 3:10 P.M.
Bradley, Linda	March 30	Apr. 2, 9:40 A.M.
Brusewitz, Ruth	April 1	Apr. 3, 9:20 P.M.
Cleven, Laura	March 30	Apr. 2, 3:30 P.M.
Couillard, Donna	March 29	Apr. 1, 9:40 P.M.
Couillard, Kenneth	March 29	Apr. 1, 9:20 P.M.
Dobberstein, Ardys	March 29	Apr. 1, 2:50 P.M.
Edler, Betty	March 30	Apr. 3, 2:50 P.M.
Eisenreich, Mildred	March 30	Apr. 3, 1:30 P.M.
Ellis, Leslie	March 29	Apr. 1, 3:30 P.M.
Emerich, David	March 30	Apr. 2, 10:00 A.M.
Emerich, Ray	March 30	Apr. 2, 12:50 P.M.
Emling, Esther	March 30	Apr. 2, 3:50 P.M.

NAME	(1974) DATE OF SERVICE	DATE (1974) AND TIME OF HEARING
Exenberger, Janice	March 30	Apr. 2, 8:00 P.M.
Fraaza, Richard	March 30	Apr. 2, 1:10 P.M.
Friemark, Betty	March 30	Apr. 2, 10:20 A.M.
Fuerst, Hazel	April 1	Apr. 2, 10:40 A.M.
Grall, Patricia	March 30	Apr. 2, 9:00 A.M.
Gruetzmacher, Carol	March 29	Apr. 1, 3:50 P.M.
Grummer, Mabel	March 30	Apr. 2, 8:20 P.M.
Hammond, Ronald	April 1	Apr. 3, 1:50 P.M.
Hanke, David	April 1	Apr. 2, 8:40 A.M.
Haupt, Edith	March 30	Apr. 3, 2:10 P.M.
Herb, Kathryn	March 30	Apr. 2, 8:40 P.M.
Herwig, Sandra	March 30	Apr. 2, 9:00 P.M.
Hettiger, David	March 30	Apr. 2, 1:30 P.M.
Hildebrand, Russel	March 29	Apr. 1, 9:40 A.M.
Hmielewski, Ryan	March 29	Apr. 1, 8:00 P.M.
Hoffman, Carol	March 29	Apr. 1, 8:40 P.M.
Jacobson, Kay	March 30	Apr. 2, 1:50 P.M.
Jeffers, Peter	March 29	Apr. 1, 10:00 A.M.
Johnson, Darrell	March 29	Apr. 1, 10:20 A.M.
Johnson, Richard	March 30	Apr. 2, 11:00 A.M.
Jurkowski, Eleanor	March 30	Apr. 2, 9:20 P.M.
Keller, Edna	March 30	Apr. 2, 11:20 A.M.
Keller, Mary	March 30	Apr. 2, 9:40 P.M.
Krause, Eleanor	April 1	Apr. 3, 9:40 P.M.
Kreul, Paul	March 29	Apr. 1, 10:40 A.M.
Laabs, Winnifred	March 30	Apr. 1, 9:00 P.M.
Larget, James	March 29	Apr. 1, 8:20 P.M.
Larson, Jean	April 1	Apr. 3, 10:00 P.M.
Lauer, Rosemarie	March 29	Apr. 1, 11:00 A.M.
Lichte, Russel	March 30	Apr. 2, 2:10 P.M.
Lukesh, Lois	March 30	Apr. 2, 10:00 P.M.
Mertens, Kenneth	April 1	Apr. 3, 10:20 P.M.
Murphy, Judy	April 1	Apr. 3, 10:40 P.M.
Nadeau, Thomas	March 29	Apr. 1, 11:20 A.M.
Nelson, Lila	March 30	Apr. 1, 12:30 P.M.
Newhouse, Robert	March 29	Apr. 1, 12:50 P.M.
O'Hern, James	March 29	Apr. 1, 1:10 P.M.
Olson, Nancy	March 29	Apr. 1, 11:40 A.M.
Olson, Rosemarie	March 29	Apr. 1, 2:30 P.M.
Olson, James	March 29	Apr. 1, 9:20 A.M.
Pollard, Wilhelmine	March 30	Apr. 2, 2:30 P.M.
Powers, Margaret	April 2	Apr. 4, 12:00 P.M.

NAME	(1974) DATE OF SERVICE	DATE (1974) AND TIME OF HEARING
Qualmann, Ruth	March 30	Apr. 1, 1:30 P.M.
Quinn, John	March 29	Apr. 1, 1:30 P.M.
Ratsch, Michael L.	March 30	Apr. 1, 2:10 P.M.
Rickaby, Jack W.	March 30	Apr. 2, 2:50 P.M.
Robson, Tharen	March 30	Apr. 2, 11:40 A.M.
Sachs, Susan	March 30	Apr. 2, 10:20 P.M.
Sasse, Avis	March 29	Apr. 1, 10:40 P.M.
Schindhelm, John	March 30	Apr. 3, 3:10 P.M.
Schnorr, Catherine	April 1	Apr. 3, 7:00 P.M.
Steeves, John	April 1	Apr. 3, 12:10 P.M.
Stutzman, Bruce	March 30	Apr. 3, 3:30 P.M.
Suess, Carolyn	March 30	Apr. 2, 10:40 P.M.
Thede, Quintin	March 30	Apr. 3, 2:30 P.M.
Thielke, Linda	March 30	Apr. 3, 3:50 P.M.
Triolo, Carlarae	March 30	Apr. 3, 11:30 A.M.
Van Thiel, Jay	April 1	Apr. 3, 11:50 A.M.
Wall, Jean	March 30	Apr. 3, 8:00 P.M.
Weber, Edward	April 1	Apr. 3, 12:30 P.M.
Weber, Patricia	March 30	Apr. 3, 8:20 P.M.
Weigandt, Linda	April 1	Apr. 3, 12:50 P.M.
Weyenberg, Kathleen	April 1	Apr. 1, 3:10 P.M.
Wilson, Kathleen	March 30	Apr. 2, 12:30 P.M.
Wisnoski, Michael	March 30	Apr. 2, 9:20 A.M.
Wood, Ed	April 1	Apr. 3, 7:40 P.M.
Zeinert, Karen	April 1	Apr. 3, 7:20 P.M.
Zimmer, Marilyn	March 30	Apr. 1, 10:20 P.M.
Zuehlke, Mary	March 30	Apr. 3, 1:10 P.M.

NOTE: Nancy Miller was not personally served with notice of hearing. On April 1 and 2, 1974 her legal representative, pursuant to authority granted by Ms. Miller authorized her matter to be heard on April 2, 1974.

STATE OF WISCONSIN OUTAGAMIE COUNTY
CIRCUIT COURT

[Caption omitted in printing]

AFFIDAVIT IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

STATE OF WISCONSIN

ss.

COUNTY OF DANE

MICHAEL WISNOKSI, being first duly sworn, on oath deposes and says:

1. That your affiant, Michael Wisnoski, is an adult resident of Outagamie County, State of Wisconsin, residing at Route 1, North Road, Appleton, Wisconsin. He is the President of the Hortonville Education Association and is by profession a public school teacher.

2. That he is a Plaintiff in the above entitled case.

3. That all the facts herein set forth are within his personal knowledge.

4. That at all times material hereto, your affiant has been a junior high school science teacher, science department chairman and elementary science consultant employed by the Hortonville School District No. 1. The 1973-74 school year was his seventh year of employment by said school district.

5. That the Hortonville Education Association represents all teachers employed by the Hortonville School District No. 1 and is the collective bargaining agent for said teachers.

6. That on the evening of January 23, 1974, the Hortonville Education Association met with the Hortonville Board of Education. The Association made a proposal to the Board, which the Board flatly rejected. The Board did not offer any counterproposals during the course of the meeting, which lasted until dawn. As a result of the failure of the Board to offer any response to the Association's proposal, the Association began informational picketing on January 24, 1974. This informational picketing continued through January 30, 1974.

Said informational picketing terminated on or about January 30, 1974. At no time was a final agreement ever reached on a 1973-74 collective bargaining agreement.

7. At about 7:30 o'clock in the evening on Saturday, March 30, 1974, your affiant was served a notice by the Hortonville Board of Education that it had scheduled a hearing, to determine whether or not to discharge him, for Tuesday morning, April 2, 1974, at 9:20. Your affiant did not have an opportunity to consult with any attorney until Monday, April 1, 1974. Only individual teachers were notified of the scheduled Board hearings. The Association was not given any notice by the Board of said hearings involving the employees it represents. The Association did not receive notice as to which of its members had received said Notice of Hearing.

8. On Monday, April 1, 1974, your affiant appeared with his attorney, Bruce Ehlke, before the Hortonville Board of Education. At that time, Attorney Ehlke objected to the inadequate notice he had been given of the discharge hearing scheduled by the Board, and of his lack of opportunity to prepare his defense. The Board, through counsel, requested that Mr. Ehlke more specifically indi-

cate the amount of time that his clients would need to prepare a defense, to the allegations contained in the individual notice of hearing. Mr. Ehlke responded that he wanted to put in evidence of the conduct of the Board. Mr. Ehlke stated that after putting in said evidence he would let the Board know if he needed more time. Mr. Ehlke was never permitted to question the Board members or to put in said evidence. Mr. Ehlke's objection to lack of adequate and timely notice was dismissed by the Board.

9. At said proceedings, Mr. Ehlke objected to the Board sitting as the decision maker in any hearing concerning your affiant's discharge, because the Board itself was involved as an adverse party in the very dispute that had generated the Board's action to discharge him. This objection was also dismissed by the Board.

10. Mr. Ehlke requested to present evidence in this affiant's defense and in mitiation of any conduct on his part that the Board might consider to be a basis for terminating his employment. This request was denied by the Board on the advice of the Board's legal counsel, Mr. Ruhly, who declared said evidence to be immaterial.

11. Your affiant authorized the Hortonville Education Association to respond in his behalf at the April 1, 1973, proceeding. Your affiant chose to follow Mr. Ehlke's advice and not individually answer any questions from Board members. The Board's questions under the circumstances constituted coercion and harassment in a labor dispute.

12. Mr. Ehlke and your affiant were advised by Mr. Ruhly that the only inference the Board then was con-

sidering it might draw from your affiant's refusal to answer said questions was that the Association's members were engaged in a work stoppage. At no time did either Mr. Ehlke or your affiant, or any other Association member present at the hearing, ever state that such an inference was factually appropriate or lawfully to be drawn from a refusal to answer the Board's questions. Further, your affiant believes that, even if such a factual inference is drawn, without more, no legal conclusion can be drawn from it.

13. On April 3, 1974, your affiant received a letter from the Board of Education which letter notifies him that the Board had acted to terminate his employment with the Hortonville Joint School District No. 1. On that same day your affiant also received in the mail a copy of the Board resolution which decreed that all teachers represented by the Hortonville Education Association, except one, were discharged, and that the Board would dishonor the teaching contracts for the 1974-75 school year that it previously had tendered to said teachers.

14. Ms. Tonia Stamborski, one of the Hortonville teachers served with a Notice of Hearing, appeared separately before the Board and was not represented by the Association. Ms. Stamborski received only a reprimand from the Board and her employment was not terminated. She was treated differently than the teachers who were represented, before the Board, by the Association.

15. At no time has your affiant ever been informed of the evidentiary basis for the Board's conclusion that he has breached his contract or engaged in an unlawful strike. Your affiant, further, has never been informed of

the evidentiary basis for the Board's decision to terminate his employment, both for the 1973-74 school year and for the 1974-75 school year as well.

16. The decision to terminate the employment of your affiant was made by the Board at a special meeting on April 2, 1974. No notice of said special meeting was ever given to your affiant, the Association or the public in general.

17. The Board has hired temporary and permanent replacements for members of the Association and other teachers discharged by the action of the Board on April 2, 1974.

18. Your affiant says that he is entitled to maintain the above captioned action and this affidavit is made in opposition to a Motion for Summary Judgment by the Defendants.

Dated this 25 day of June, 1974.

/s/ MICHAEL WISNOSKI

[Subscription omitted in printing]

STATE OF WISCONSIN OUTAGAMIE COUNTY
CIRCUIT COURT

[Caption omitted in printing]

DECISION ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT TO FIRST CAUSE OF ACTION

NATURE OF PROCEEDINGS:

The plaintiffs filed their original verified complaint alleging a single cause of action on April 5, 1974 to which the defendants responded by way of a verified answer filed April 24, 1974. Subsequently on May 31, 1974 the plaintiffs upon leave of this Court and pursuant to a verbal agreement of counsel for all parties filed a verified amended complaint alleging four separate causes of action. Prior to the expiration of forty days after joinder of issue by the defendants' answer to the original complaint, this Court by an order dated June 3, 1974 extended the time for moving for summary judgment pursuant to Secs. 269.45 and 270.635, Stats., inasmuch as this Court construed Snowberry vs. Zellmer (1964), 22 Wis. 2nd 356; 126 NW 2nd 26, to require a motion for summary judgment to be made within forty days of joinder of issue by the original pleadings. The defendants answered the first cause of action alleged in the amended complaint and moved thereafter for summary judgment as to the first cause of action within the enlarged time allotted by the Court.

DECISION:

The motion for summary judgment now before this Court pertains to a cause of action based on a theory of various due process violations arising out of a strike by the plaintiff teachers of the Hortonville Joint School District No. 1. The strike commenced March 18, 1974 and on April 2, 1974 the Hortonville Board of Education terminated the employment of the 88 members of the plaintiff class. Certain members of the plaintiff class have returned to work pursuant to an order of another Court, which order is now in the appeal process. However, those members of the plaintiff class who have returned to work have continued as members of the plaintiff class in the present action.

The plaintiffs in the present case are the Hortonville Education Association which, prior to March 18, 1974 represented all teachers under contract with the Hortonville Joint School No. 1, and six of the terminated teachers who are alleged to be "representative of all teachers employed by the District whose employments the Board has acted to terminate." The requisite allegations are set forth in the plaintiffs' amended complaint so as to enable this Court to deem the present matter a class action as provided for in Sec. 260.12 Stats.

One of the defendants is the Hortonville Joint School District No. 1 which had prior to April 2, 1974 employed the plaintiff class; the remaining defendants are members and officers of the Hortonville Board of Education in their official and individual capacities as well as three administrators of the Hortonville Joint School District No. 1 in their official and individual capacities.

Termination of employment by the Hortonville Board

of Education was applicable to the 1973-74 school year contracts with the individual members of the plaintiff class and the 1974-75 school year contracts which had been tendered by the Hortonville Board of Education to the individual members of the plaintiff class. There exists no master contract between the Hortonville Education Association and the Hortonville Joint School District No. 1 for either the 1973-74 and 1974-75 school years.

In order to determine if the defendants have set forth such facts as shall show their denials or defenses to be sufficient to defeat the plaintiffs' first cause of action under the statutory criteria of Sec. 270.635, Stats. it appears appropriate in this instance to first consider the plaintiffs' theory of various procedural due process violations as set forth in the plaintiffs' amended complaint. This Court, as did the Court in American Mutual Liability Insurance Company vs. St. Paul Fire and Marine Insurance Company (1970), 48 Wis. 2nd 305; 179 NW 2nd 864, finds it necessary to review in part the amended complaint in order to determine whether the defendants' affidavit in support of their motion for summary judgment contains the required evidentiary facts so as to entitle the defendants to summary judgment. However, the amended complaint as well as the defendants' answer, as pleadings, are not effectual as factual proof and cannot perform the requisite function of affidavits. Leszczynski vs. Surges (1966), 30 Wis. 2nd 534; 141 NW 2nd 261. Only two affidavits were filed herein. Mr. Roger Weihing, a member and president of the Board of Education of the Hortonville School District No. 1, filed an affidavit in support of the defendants' motion for summary judgment. Mr. Michael Wisnoski, a member of the plaintiff class and president of

the Hortonville Education Association, filed an affidavit on behalf of the plaintiffs in opposition to the motion for summary judgment.

Paragraph 5 of the amended complaint is the first material paragraph containing allegations relating to procedural due process. That paragraph, in its entirety, alleges:

> "5. Immediately prior to, during and immediately following the weekend of March 30 and 31, 1975, the individually-named plaintiffs, and all other teachers represented by the Association, were served notices that the Board had scheduled hearings for each and every one of them, at twenty-minute intervals, commencing Monday Morning, April 1, 1974, through and until late on Wednesday evening, April 3, 1974. These notices notified the employees that the Board was considering taking action against their then current teaching contracts. Said notices failed to afford the plaintiffs, and others who received similar notices, a fair or adequate opportunity to consult with an attorney or to prepare for a hearing or to defend against the reasons that the Board might consider for the termination of their employment."

The affidavit of Roger Weihing, submitted on behalf of the defendants states in paragraphs 8 and 9 essentially that during a special School Board meeting held on March 29, 1974 it was decided to schedule disciplinary hearings for each individual member of the plaintiffs class then engaged in a work stoppage and that a notice of the disciplinary hearings were delivered to the Outagamie County Sheriff's Department on March 29, 1974 for service on each individual teacher. Exhibit "B" attached to Mr.

Weihing's affidavit is a copy of the notice of the individual disciplinary hearings. Also attached to that same affidavit and identified as exhibit "C" is a compliation of the dates the disciplinary hearing notices were served on the individual members of the plaintiff class and the date and times of the scheduled disciplinary hearings. It appears from exhibit "C" that all the teachers subject to a disciplinary hearing were served notice of such hearing on or before April 2, 1974 with the exception of Mrs. Nancy Miller. In all, eleven teachers were served notices, including the day of service, four days before their scheduled hearing, fifty-one teachers three days prior to their scheduled hearing, twenty-two teachers two days prior to their scheduled hearing, three teachers one day prior to their scheduled hearing and one teacher received her notice the day of her scheduled hearing. It shou'd be noted that the first notices were served on March 29, 1974 which was a Friday (twenty-three in number) with the balance being served on the next day, a Saturday (fourty-four in number) and both Monday (twenty in number) and Tuesday (one in number) of the following week. As to the actual contents of the notice of disciplinary hearings, the dates the notices were served and the dates of the scheduled disciplinary hearings no factual controversy exists.

However, with respect to the aforesaid notices and their service on the teachers it is the plaintiffs' conclusion as stated in the amended complaint that such notice did not give them adequate opportunity to:

a) consult an attorney

b) prepare for their scheduled hearings

c) defend against reasons the School Board might consider for termination of employment.

By means of Mr. Weihing's affidavit, in particular paragraphs 9 and 10 thereof the defendants have set forth facts relating to the conduct and statements of plaintiffs' counsel at the April 1, 1974 hearing before the Hortonville Board of Education. That meeting was attended by all members of the plaintiff class in mass rather than individually as scheduled with the exception of five teachers who remain members of the plaintiff class. Among those facts are the plaintiffs' appearance before the Hortonville Board of Education with an attorney, the objection of the plaintiffs' attorney to the insufficiency of the notice without a specified request as to the additional length of time needed for preparation or a request for an adjournment and the participation of plaintiffs' counsel in the proceedings. On the basis of those primary facts the defendants urge that it can reasonably be inferred that the notice in question was timely and adequate and, if not, any objection thereto was waived by failure to specifically request an adjournment of a specified length.

With respect to the adequacy and timeliness of the notice of the disciplinary hearings this Court deems there to be no controverted facts. Only the inferences to be drawn from those facts upon which legal conclusions can be based are in dispute. This is not to say, however, that such inferences are reasonable.

Paragraph 6 of the plaintiffs' amended complaint relates to the actual procedure utilized at the April 1, 1974 appearance of all but five members of the plaintiff class before the Hortonville Board of Education. In its entirety paragraph 6 recites:

"6. On Monday, April 1, 1974, the plaintiffs and other similarly situated teachers appeared before the Board and objected to the lack of fair and adequate notice of and opportunity to prepare for the scheduled hearings, and objected to the Board acting as the decision-maker in their cases, because of its involvement in the very circumstances which gave rise to the Board's consideration of the termination of their employments. Plaintiffs and other teachers requested the opportunity to present evidence in their defense, in mitigation of reasons the Board might consider grounds for the termination of their employments. At the beginning of said appearance before the Board, the plaintiffs and the other teachers further requested the opportunity to examine adversary management personnel relative to the charges against them. All of the objections and requests made by the plaintiffs and by other teachers were denied by the Board, which acted on the advice of its attorney. The Board's attorney acted both as counsel to the Board and as prosecutor, presenting the charges and evidence against the plaintiffs. No evidence was adduced at the hearings against any of the plaintiffs or other teachers who appeared before the Board."

Scrutinizing Mr. Weihing's affidavit submitted on behalf of the defendants with respect to that portion pertaining to the April 1, 1974 proceedings before the Board of Education, there are the following pertinent facts:

a) counsel for the plaintiffs did object to the sufficiency and adequacy of the disciplinary hearing notices

b) counsel for the plaintiffs was denied the opportunity to question various Hortonville Board of Education members adversely

c) counsel for the plaintiffs did make an offer of proof

d) counsel for the plaintiffs instructed the members of the plaintiff class not to answer questions addressed to them individually and the plaintiff class did not individually respond to any questions by the Board of Education

e) counsel for the plaintiff advised the Board of Education that all members of the plaintiff class were relying on the Hortonville Education Association to respond on their behalf and that indivdiual hearings were not necessary.

The evidentiary facts contained in the plaintiffs' affidavit in opposition to the motion for summary judgment do not controvert the facts related above as they appear in the defendants' supporting affidavit. The plaintiffs' affidavit does, however, add the additional facts that counsel for the plaintiffs objected to the Hortonville Board of Education acting as decision-maker and its counsel acting in a dual capacity as adviser and prosecutor. Neither the affidavit submitted by the defendants or the plaintiffs actually state whether evidence was received at the April 1, 1974 hearing beyond the offer of proof made by plaintiffs' counsel.

It should be noted that paragraph 10 of the affidavit of Michael Wisnoski submitted on behalf of the plaintiffs stated that the Board of Education refused to permit evi-

dence to be presented on behalf of Mr. Wisnoski by way of a defense and in mitigation of any conduct on his part. As to whether that statement refers to evidence in addition to the offer of proof made by plaintiffs' counsel and the request to adversely examine various Board of Education members is unclear unless read in conjunction with paragraph 11 of that same affidavit. Paragraph 11 states that Mr. Wisnoski authorized the Hortonville Education Association to respond on his behalf and he personally chose to follow his counsel's advice not to respond individually. The only reasonable inference from the apparently contradictory statements of fact is that paragraph 10 of Mr. Wisnoski's affidavit in conjunction with the remainder of his affidavit, and in particular paragraph 11, refers to the offer of proof and the attempt to adversely examine the Board of Education members on behalf of all teachers represented by the Hortonville Education Association, not any additional attempt to present evidence on behalf of Mr. Wisnoski individually. Also, it should be noted that Mr. Wisnoski's individual disciplinary hearing had been scheduled as shown by exhibit "C" not for April 1st but for 9:20 a.m. on April 2, 1974.

The material facts as to the procedure of what the plaintiff class turned into a mass disciplinary hearing on April 1, 1974 are not controverted. It is only the inferences to be drawn from those facts and various statements made by counsel for both the plaintiffs and the defendants that are disputed.

Considering next paragraph 7 of the plaintiffs' amended complaint it is alleged:

> "7. By letters dated April 2, 1974, the plaintiffs and, on information and belief, almost all other

> teachers employed by the District, were notified by the Board that the Board had acted to terminate their employment, both under the current teaching contracts, and under the teaching contracts they had signed for the 1974-75 school year. By the same letters, the plaintiffs and other teachers were invited individually to reapply for employment with the District. At no time have the plaintiffs, or any other teachers similarly situated, ever been informed of the evidentiary basis for the Board's decision to terminate their employment both this year and for the 1974-75 school year."

A copy of the termination notice was not attached to the affidavit submitted on behalf of the defendants in support of their motion for summary judgment. However, paragraph 16 of the defendants affidavit specifically refers to and identifies the termination notice in question and thereby incorporated by reference exhibit 2 introduced at a prior evidentiary hearing conducted by this Court. The notice of termination provided in pertinent part:

> The Board found you guilty of the conduct set forth in Mr. Weihing's notice of March 29, 1974. Specifically it is found that since March 18, 1974:
>
> You breached your individual employment contract; You engaged in strike activity contrary to Wisconsin law.
>
> The Board further found that these breaches of duty in law constitute good and sufficient cause for the immediate termination of your teaching contract.
>
> Therefore, you are advised that your employment

with the Hortonville Community Schools, Joint School District No. 1, Village of Hortonville, et al., is hereby terminated, effective immediately. Furthermore, this action includes the withdrawal of the offer of employment for the 1974-75 school term, and/or termination of such tendered employment contract."

The defendants' affidavit further states that the aforementioned notice of termination was sent by certified mail to each terminated member of the plaintiff class. Nothing in the affidavit of Mr. Wisnoski submitted on behalf of the plaintiffs controverts the contents or mailing of the notice of termination. According to the plaintiffs' affidavit, on April 3, 1974 he received a copy of the Board of Education's resolution to terminate the plaintiff class. Additionally, Mr. Wisnoski states in his affidavit in paragraph 15 that he has personally never been informed of the evidentiary basis for the Board of Education's conclusion that he has breached his contract or engaged in an unlawful strike, nor that he was ever informed of the evidentiary basis for the decision to terminate his employment for the 1973-74 and 1974-75 school years.

Once again it is apparent that as to the pertinent material facts relating to alleged due process violations as set forth in paragraph 7 of the plaintiffs' amended complaint there is no dispute other than as to the inferences to be drawn from the facts.

Reviewing next paragraph 8 of the plaintiffs' amended complaint it is alleged therein:

"8. The Association, which represents the plaintiffs and all other teachers employed by the district, was not informed of the hearings scheduled by and before

the Board for April 1, 2, and 3, 1974. The Association also was not given any advance notification of the Board's decision to terminate the employment of the plaintiffs and other teachers represented by the Association."

There is no reference contained in the defendants' affidavit that Mr. Weihing addressed to notice to the Hortonville Education Association itself with respect to the scheduled disciplinary hearing of April 1, 2 and 3, 1974 and the decision to terminate the employment of the plaintiff class. In paragraph 7 of the plaintfffs' opposing affidavit it is stated that no advance notice was given to the Hortonville Education Association as an organization with respect to the disciplinary hearings. In paragraph 13 of the plaintiffs' affidavit it is futther stated that notice of the Board of Education decision to terminate the members of the plaintiff class was received post facto.

Concerning the question of advance notice to the Hortonville Education Association there appears in the affidavits no controverted facts as to the lack of advance notice of the disciplinary hearings and the decision to terminate the employment of the plaintiff class.

Summarizing the plaintiffs' allegation of specific procedural due process violations they are in substance in brief:

a) Timeliness and adequacy of the disciplinary notices.

b) Board of Education sitting as decision-maker at the disciplinary hearing.

c) Prohibition of adverse examination of various

Board of Education members at the disciplinary hearing.

d) Counsel for the Board of Education simultaneiously acting as adviser and prosecutor.

e) No evidence against the plaintiff adduced at the disciplinary hearing.

f) Lack of notice of evidentiary basis for concluding there was a breach of contract and an unlawful strike nor notice of evidentiary basis for termination of employment.

g) Lack of advance notice to the Hortonville Education Association concerning the disciplinary hearings and the termination of employment of the plaintiff class.

On the basis of the foregoing alleged violations of procedural due process the plaintiffs formulate their theory of the first cause of action in their amended complaint. The plaintiffs allege that all of the aforesaid due process violations were done under color of State law, intentionally, maliciously, capriciously and arbitrarily, and in bad faith and as part of a conspiracy to deny the members of the plaintiff class their procedural due process rights under the 14th Amendment to the United States Constitution and Article 1 of the Wisconsin Constitution. As a result, the plaintiffs allege, inter alia, that they have effectively been denied their property interest in continued employment with the Hortonville Joint School District No. 1 as well as their liberty in securing employment in the teaching profession. Such deprivation of procedural due process the plaintfffs further allege has resulted in irreparable

damage to their persons, reputations and financial interests.

As stated by the Court in American Mutual Liablity Insurance Company vs. the St. Paul Fire and Marine Insurance Company, supra, at page 312, a motion for summary judgment, when invoked by a defendant is used on the assumption that even though a complaint states a cause of action the cause is factullly unsupportable. Inasmuch as the Court has deemed there to be no dispute as to the material facts involved in this case, if the defendants' affidavit in support of the motion for summary judgment contained no additional facts this Court could deem the defendants to have attempted to use a motion for summary judgment as a substitute for a demurrer.

However, there remains one fact in the defendants' affidavit by Mr. Weihing which is uncontroverted by the plaintiffs' affidavit in opposition to the motion for summary judgment. That fact is set forth in paragraph 2 of Mr. Weihing's affidavit which reads:

> "That commencing Monday, March 18, 1974, the teaching employees then employed by said school district engaged in an unlawful strike against the defendant school district; . . ."

Reference to the strike being unlawful is, of course, a conclusion and not a fact and as such, is inappropriate in an affidavit requiring evidentiary facts. Sec. 270.635, Stats. Continuing through the remainder of Mr. Weihing's affidavit it is clearly stated that the strike by the members of the plaintiff class continued up to and through April 2, 1974, the date of the employment discharges. Thus, it is uncontroverted that the underlying fact that a

strike existed commencing March 18, 1974 establishes the framework within which this Court can consider the concept of due process. For as the Court stated in Goldberg vs. Kelly, 397 U.S. 254, 263, 90 S. Ct. 1011, 1018, 25 L. Ed. 2nd 287 (1970), in quoting an earlier case:

> ". . . consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been affected by governmental action."

EMPLOYER-EMPLOYEE RELATIONSHIP SUBSEQUENT TO MARCH 18, 1974

The individual members of the plaintiff class were prior to March 18, 1974 municipal employees as defined in Sec. 11.70(1)(b), Stats., [sic] and the Hortonville Joint School District No. 1 was at all times pertinent herein a municipal employer as defined in Sec. 11.70(1)(a), Stats. [sic] Thus at all times relevant the members of the plaintiff class were prohibited from engaging in a strike by virtue of Sec. 117.70(4)(1) [sic] which provides:

> "Nothing contained in this subchapter shall constitute a grant of the right to strike by any county of municipal employee and such strikes are hereby expressly prohibited."

It is urged by the defendants that this Court equate the terms "strike" and "quit" thereby alleviating any constitutional duty on their part to grant the plaintiff class due process. This State has not adopted that position with respect to strikes in the public employment sector nor have

the defendants cited authority from other jurisdictions on that point. In the private employment sector the Wisconsin rule is that a strike is a cessation of work on the part of strikers and does not in and of itself constitute a termination of the employer-employee relationship; it is a subsequent discharge which severs the employer-employee relationship. Marathon Electric Manufacturing Corporation vs. Industrial Commission (1955) 269 Wis. 394; 69 NW 2nd 573. Fredericks vs. Industrial Commission (1958) 4 Wis. 2nd 519; 91 NW 2nd 93. In fact, it is a frequent practice in this State for a municipal employer to obtain a court injunction when confronted with a strike. Such a procedure is based on the existence of an employer-employee relationship. While no longer valid law, Sec. 111.70(7), Stats., (void since September 1, 1973) referred to "employe" and "employer" in a public employment strike situation wherein the legislature prescribed the penalty for continuing to engage in a strike after a court injunction was issued. In their brief the defendants have made reference to obtaining a Court order enjoining the strike as one of the options available to them which they need not have nor did they exercise. This Court can see a grave consequence to the general public by equating the terms "strike" and "quit" when one considers police, fire and sanitation personnel striking in metropolitan areas. Operations would not only be at a standstill but would be hampered long after commencement of a strike. I find no basis in law nor in public policy that compels construing a prohibited public employment strike as in and of itself terminating the municipal employer-employee relationship.

DUE PROCESS CONCEPT OF PROPERTY AND LIBERTY

As employees of the Hortonville Joint School District No. 1 it must be next determined if the members of the plaintiff class were entitled to a due process hearing. The State action involved is, of course, the discharge by the school district which is created and controlled by State law and State agencies. The property interest of the plaintiffs does not arrive by means of statutory provision because Chapter 118 of the Wisconsin Statutes does not provide for tenure for teachers employed in a school operating and lying in a county having a population less than 500,000. Section 118.21, Stats., does, however, require individual contracts to be executed between individual teachers and school boards. In addition, Sec. 118.22, Stats., establishes the mechanism for renewal or refusal to renew such individual contracts, but no procedure for discharge is established by statute. Sec. 118.22, Stats., further requires that notice of renewal or refusal to renew individual contracts must be given on or before March 15 of each year. Although the plaintiff class was engaged in a prohibited strike when discharged, the members of the plaintiff class retained an interest in continued employment. Perry vs. Sindermann, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 570 (1972) and Board of Regents of State College vs. Roth, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 548 (1972) involved nonrenewal of untenured teachers who had one year contracts. Although the Court in Roth, supra, held the teacher not to be entitled to due process because he had no interest or entitlement to future employment, the Court stated:

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to indicate those claims.
>
> "Property interests, of course, are not created by the constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." (408 U.S. 577, 92 S. Ct. 2709)

In Perry, supra, the Court did find a denial of due process stating:

> "A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing." (408 U.S. 601, 92 S. Ct. 2699)

A summary dismissal of an untenured teacher not under formal contract without a hearing or inquiry was contrary to due process on the basis of an implied promise of continued employment. Connell vs. Higgenbotham (1971) 403 U.S. 207, 91 S. Ct. 1772, 29 L. Ed. 418.

Certainly the plaintiff teachers relied on their employment with the defendant Hortonville Joint School District No. 1. Prior to discharge the plaintiff teachers were entitled to their jobs for the remainder of the 1973-74 school year with the valid expectation of continued employment for the 1974-75 school year. Such objective expectation of continued employment could in part be founded in the statutory dictates of Secs. 118.21 and 118.-22, Stats., with respect to the mandatory existence of individual teacher contracts and nonrenewal procedures for those contracts. In addition to their existing individual contracts for the school year 1973-74, the plaintiff teachers had been tendered contracts for the 1974-75 school year. Thus this Court deems the members of the plaintiff class to have the requisite property interest, that is, expectation of continued employment with the defendant Hortonville Joint School District No. 1 so as to entitle them to a due process hearing.

The Court in Roth, supra, also addressed itself to the issue of deprivation of liberty of a result of a stigma attached stemming from charges against an individual wherein it is stated:

> "[W]here a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." (citations omitted; 408 U.S. 573, 92 S. Ct. 2702)

In the instant case the charges asserted against the plaintiff teachers were that they had breached their individual contracts and engaged in an unlawful strike contrary to Wisconsin law. While those charges do not bear the same

stigma as would charges of immorality or dishonesty, they do constitute charges that in all likelihood would diminish the plaintiff teachers' prospective employment opportunities. Thus this Court also deems there to be a singificant potential deprivation of liberty because of the nature of the charges so as to entitle the plaintiff class to a due process hearing.

DUE PROCESS PROCEDURES

Having been entitled to a due process hearing and having been granted a hearing it must next be determined if the hearing granted the plaintiff teachers was constitutionally anticeptic within the framework of due process. This Court has previously found no controverted facts to exist as to the hearing procedures utilized by the defendants. The concept of due process is not static nor are its ramifications identicial in every situation. The Court in Arnett vs. Kennedy — U.S. —, 94 S. Ct. 1633, 1645, — L. Ed. 2nd — (1974) notes:

> "The types of 'liberty' and 'property' protected by the Due Process Clause vary widely, and what may be required under that clause in dealing with one set of interests which it protects may not be required in dealing with another set of interests.
>
> 'The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.' " (citation omitted)

Thus the principals of due process in the instant case must be tempered by the underlyng facts as presented in the affidavits filed in support of and in opposition to the mo-

tion for summary judgment. The factual setting involves a strike by the members of the plaintiff class who constituted all but a few teachers then under contract with the Hortonville Joint School District No. 1. The effect of the strike which commenced March 18, 1974 was to completely bring the operations of the school in that district to an immediate and complete halt. By means of substitute teachers the schools resumed operations sporatically after March 25, 1974 until April 2, 1974 when the Board of Education voted to terminate the employment of the plaintiff class. After April 8, 1974 the schools were again opened permanently with the employment of "replacement" teachers. It is within the framework of the foregoing facts that this Court determine, if it can do so as a matter of law, whether the plaintiff class was accorded due process.

It is undisputed that a letter dated March 23, 1974 was sent to each member of the plaintiff class by the superintendent of the Hortonville Joint School District No. 1 advising that the strike was contrary to Sec. 111.70, Stats., and further that: "The School Board can not and will not condone unlawful activity under this statute." The letter, a copy of which has been identified as exhibit "A" and attached to the defendants' affidavit herein concluded by stating: "We regret having to issue this letter, but wanted to make certain that all teachers of the Hortonville School District are fully informed that under State law, teachers' strikes are expressly prohibited."

Next, the record pertinent to the motion for summary judgment states that the members of the plaintiff class were served a notice of disciplinary hearing between March 29 and April 1974. Exhibit "B" attached to the defendants' affidavit in support of the motion for summary judgment accomplished the following purposes:

a) disclosed the precise charge made against the individual teacher - since March 18, 1974 the existence of a breach of the individual employment contract and engagement in an unlawful strike contrary to Wisconsin law

b) identified who made the charge - Superintendent Obry

c) advised of possible disciplinary action - termination of employment contract

d) established specified date, time and place of hearing

e) informed individual teachers of opportunity to present any statement or evidence relevant to the alleged conduct.

The teachers named as plaintiffs in this case and who allege themselves to be representative of the entire class of teachers were served notice not less than two days nor more than three days prior to their scheduled hearing time. Hence the crucial issue with respect to notice is whether such notice under the conditions related above were adequate and timely. In Goldberg, supra, the Court held a due process hearing essentially in terminating welfare benefits and stated therein:

> "The fundamental requisite of due process of law is the opportunity to be heard. (citations omitted) The hearing must be at a meaningful time and in a meaningful manner. (citation omitted) In the present

> context the principals require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally. (397 U.S. 267, 268, 90 S. Ct. 1020)

Considering the due process requirements in the case of teacher dismissed during the school year upon a two day notice of hearing and after an oral statement of reasons for a suspension commencing four days prior to the notice of hearing, the Court in Ahern vs. Board of Education of School District of Grand Island, 456 F. 2nd 399, 403 (8th Cir. 1972) stated:

> ". . . she might have been notified with greater precision of the basis for her suspension and dismissal, and the time between the notice and the hearing might have been greater, and the school board might have detailed its decision in a formal writing, none of these ideal conditions are prerequisites to a finding that a hearing has been granted which comports with accepted notions of procedural due process. A fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." (citation omitted)

Applying the foregoing due process standard as set forth in Goldberg, supra, and Arnett, supra, which were drawn from earlier U.S. Supreme Court decisions cited in Ahern, supra, to the case at bar the undisputed facts show an adequate and timely notice to have been given to the plaintiff class under the then existing condition of forced

school closings as a result of the prohibited strike. The notice provided by exhibit "B" attached to the defendants' affidavit herein unequivocally stated the precise nature of the charge, its source, the possible consequences as well as the time and manner in which the members of the plaintiff class could refute the charge. Counsel for both parties cited numerous cases involving various fact situation in which notice of a specific duration was deemed constitutionally appropriate. Those cases, however, deal with areas of law most dissimilar to the area of employer-employee relationship in a prohbited strike setting such as the present case. What this Court deems to be adequate and timely notice as a matter of law in the present case is done in the context of the nature of the charge. The plaintiff class either was on strike in violation of Sec. 111.-70(4)(1), Stats., or it was not on strike. If the fact was that a strike was in existence as set forth in the defendants' affidavit herein, then there could be no defense to the charge for Sec. 111.70(4)(1) expressly prohibits strikes in the public employment sector. As this Court has previously held in a ruling on a request by the plaintiffs for temporary injunctive relief, Wisconsin does not recognize that strikes in the public employment sector are permissible where justified or provoked. If the State law prohibiting public employment strikes was not so express or provided exceptions to the strike prohibition, this Court could not readily deem the notice of disciplinary hearing to be timely and adequate as a matter of law. Had the plaintiff class been charged additionally with an indefinite allegation such as misconduct or inefficiency, then the notice in question might very well not be adequate or timely

within the concept of due process. Inasmuch as there can be no legal defense to the charge of striking in violation of Sec. 111.70(4)(1) of the Wisconsin Statutes this Court cannot foresee the need of a notice of longer duration in order to defend against such charge. Simply, the plaintiff class either was or was not on strike.

As noted earlier in this decision there is no controversy in the fact that the Hortonville Board of Education sat as the decision maker, that the plaintiffs were prohibited from adversely examining various members of the Board of Education and that counsel for the Board of Education acted in the dual capacity of adviser and prosecutor. As a matter of law these factors do not constitute a deprivation of due process.

Numerous U.S. Supreme Court decisions do require the decision-maker in a due process setting to be impartial. But again due process must be viewed within the framework of the setting of the present case. Sec. 118.22, Stats., provides in pertinent part:

> "No teacher may be employed or dismissed except by a majority vote by a full membership of the board."

Thus no one but the Board of Education could by State law make the decision which ultimately was made to discharge the teachers. Then too, the charge of striking in violation of State Statute was the sole charge before the Board of Education; this is not a situation similar to charges of misconduct or inefficiency where it would be necessary for the decision-maker to judge the credib'ity of witnesses and weigh the evidence. The uncontroverted fact in the situation is that a strike existed and therefore the

degree of impartiality which may have been required in other settings was not necessary to adjudicate the single fact involved in this case. In that connection it must be noted further that the plaintiff class has not claimed to have been discharged for any constitutionally impermissible reason.

With respect to the denial of the opportunity to adversely examine various members of the Hortonville Board of Education it must first be pointed out that it was Superintendent Marvin Obry and not any member of the Board of Education who charged the plaintiffs with striking. In a due process setting it is necessary that there be afforded an opportunity to confront and cross-examine adverse witnesses. Go'dberg, supra; Greene vs. McElroy, 360 U.S. 474, 79 S. Ct. 1400, 3 L. Ed. 2nd 1377 (1959). The members of the Hortonville Board of Education on the uncontroverted facts were not adverse witnesses. The purpose of the plaintiffs' attempt to adversly examine the board members was stated at the April 1, 1974 hearing which was reported and the transcript thereof incorporated in the defense affidavit in support of the motion for sumary judgent. Plaintiffs' counsel at that hearing was asked to indicate the nature of the evidence he wished to present and he responded in this fashion:

> "Yes, it goes to bargaining here, and I have some questions of some of the Board members." p. 28 of transcript)

Thereafter plaintiffs' counsel made an offer of proof confined solely to the bargaining issues. Clearly, the purpose of adversely examining the board members was not directed to the charge of striking but to facts invo'ving negotia-

tions on a variety of issues in the labor dispute; the purpose was to justify the strike which this Court has deemed legally impossible. The denial of adverse examinaton of various board members in this context was proper.

Considering the dual capacity of the Board of Education's counsel as adviser and prosecutor this Court finds no such constitutional prohibition. The citations presented to this Court by the plaintiffs deal with economic or personal conflicting interests of the decision maker. In this situation the capacities of adviser and prosecutor are not constitutionally incompatible.

Also uncontroverted are the contents of the transcript of the April 1, 1974 hearing and the termination notice both of which were incorporated by reference in the defendants' affidavit in support of the motion for summary judgment. The transcript of the April 1, 1974 hearing contains the following statement of plaintiffs counsel:

> "We have already indicated, everybody got the same form, and they are all charged with the same thing. They have consulted and conferred among themselves and concurred that they have done or not done the same things, all of which would be within the knowledge of the management. . . ." (P. 22 of transcript, emphasis added)

The plaintiff class whose members had individual hearings scheduled for the morning of April 1, 1974 had their hearings called. Their attorney who was present advised the Board of Education that no individual member of the plaintiff class would answer any question or participate on an individual basis. Thereafter all members of the plaintiff class then represented by counsel on an individual basis, eighty-two in number, advised the Board through counsel that they desired one mass hearing instead of individual hearings as had been scheduled; further they advised through counsel that they would not respond to any questions put to them by the Board on an individual basis. The same procedure was followed on a subsequent date for members of the plaintiff class not represented by counsel on April 1, 1974.

In a statement to the Board at the April 1, 1974 hearing plaintiffs' counsel advised that the eighty-two individuals he then represented discussed the only inference the Board stated it would draw from the plaintiffs' refusal to answer questions individually, namely, that the plaintiffs were "engaged in a work stoppage." (P. 24 of transcript) Plaintiffs' counsel only objected to any legal conclusions being drawn from such factual inference. Whereupon the Board of Education rested and the plaintiffs as a body attempted to adversely examine some members of the Board and made an offer of proof as was discussed above in connection with collective bargaining issues.

Also discussed earlier in this decision was the contents of the notice of termination dated April 2, 1974. The notice of termination in brief, informed the plaintiff class that they had been found guilty of the conduct charged in the notice of hearing dated March 29, 1974 namely, having since March 18, 1974 breached their individual employment contracts and engaging in strike activity contrary to Wisconsin law.

The purpose of disclosing the evidentiary basis in a due process setting was stated in Green vs. McElroy, supra:

> "Certain principals have remained relatively immutible in our jurisprudence. One of these is that where

> governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. (emphasis added) (360 U.S. 496, 79 S. Ct. 1413)

In the instant situation the plaintiff class knew the Board of Education had before it the information of Superintendent Obry that the teachers were on strike as noted in the notice for disciplinary hearings dated March 29, 1974. Also the plaintiff class knew, by means of a letter sent to them under the date of March 23, 1974, a copy of which was marked exhibit "A" and is attached to the defendants' affidavit in support of the motion for summary judgment, that the Board of Education had personal knowledge of the existing strike. As stated by plaintiffs' counsel at the April 1, 1974 hearing referring to the plaintiff class:

> ". . . they have done or not done the same things, all of which would be within the knowledge of the management. . . ." (P. 22 of transcript)

Thus in the present setting it would be superflous for anyone to state on the record that the plaintiff class was engaged in a strike. The plaintiff class was warned that their refusal to answer questions would result in an inference that they were "engaged in a work stoppage" in violation of their individual employment contracts and in violation of State law. Subsequently, the April 2, 1974 termination notice advised the plaintiff class that the members were found guilty of the conduct alleged in the notice of disciplinary hearing, that is, striking in violation of their individual employment contracts and State law. The applicable constitutional test is not what was the evidence adduced at the hearing or detailed in the termination notice, but rather was the basis of the Board of Education's case sufficiently disclosed so that the plaintiff class could show the evidence to be untrue.

The plaintiff class was sufficiently informed of the charges and their source so as to have a meaningful opportunity to defend themselves and decide if they had been discharged for constitutionally impermissible reasons. There are no other reasonable inferences or conclusions to be drawn from the uncontroverted facts. Therefore, this Court finds the evidence considered by the Board as disclosed to the plaintiff was sufficient to accord them due process as a matter of law in this particular setting.

With respect to lack of prior notice to the Hortonville Education Association in any of the procedures utilized by the Board of Education this Court finds no duty to afford the Hortonville Education Association with due process inasmuch as the contracts involved were those of individual teachers who were individually given notice and individually provided an opportunity for an individual hearing on their individual participation in the strike. As a practical matter, the Hortonville Education Association membership constituted the plaintiff class and the Association did appear at the April 1, 1974 disciplinary hearings. The interests of property and liberty involved here were those of the individual teachers, not the Hortonville Education Association. If the Hortonville Education Association was entitled to due process for considerations other than due process, remedies in another forum are available.

Perhaps the most volitable issue in this entire factual

setting is the allegation that the defendants conspired to deny the plaintiff class of due process. However, this Court having found no due process violations to exist within the context of this motion for summary judgment, the Court deems it unnecessary to discuss this issue further.

SUMMARY

Upon consideration of the defendants' affidavit in support of the motion for summary judgment together with the attached and incorporated documents this Court deems the defendants to have made a prima facie case.

After consideration of the plaintiffs' affidavit in opposition to the motion for summary judgment the Court deems that no material controverted facts exist.

There being no evidentiary facts in the affidavits from which reasonable but different inferences could be drawn, this Court can only conclude that although the plaintiffs have stated a cause of action such cause of action is factually unsupportable.

In addition, this Court finds as a matter of law:

1. The strike which commenced March 18, 1974 did not per se sever the relationship of employer-employee between the plaintiff teachers and the defendant Hortonville Joint School No. 1;
2. The plaintiff teachers in spite of a strike in violation of Sec. 111.70(4)(1), Stats., were entitled to due process procedures to protect their property and liberty interests; and
3. The plaintiff teachers were duly accorded due

process as required by the 14th Amendment of the Constitution of the United States and Article 1 of the Constitution of the State of Wisconsin.

Therefore, the defendants' motion for summary judgment must be granted. Counsel for the defendants are directed to prepare an order consistent with the foregoing decision and present the same to this Court for signature within fifteen (15) days from today, after obtaining approval of plaintiffs' counsel as to form.

Dated: July 19, 1974

BY THE COURT

/s/ ALLAN J. DEEHR
Circuit Judge

STATE OF WISCONSIN OUTAGAMIE COUNTY
CIRCUIT COURT

[Caption omitted in printing]

DECISION ON DEMURRERS TO SECOND, THIRD AND FOURTH CAUSES OF ACTION

NATURE OF PROCEEDINGS:

The plaintiffs filed their original verified complaint alleging a single cause of action on April 5, 1974 to which the defendants responded by way of a verified answer filed April 24, 1974. Subsequently on May 31, 1974 the plaintiffs upon leave of this Court and pursuant to verbal agreement of counsel by all parties filed a verified amended

complaint alleging four distinct causes of action. Thereafter the defendants demurred to the second, third and fourth causes of action set forth in the plaintiffs' amended complaint.

DECISION ON DEMURRER TO SECOND CAUSE OF ACTION:

The plaintiffs' second cause of action, in essence, alleged a denial of equal protection as afforded to the plaintiffs by the 14th Amendment to the Constitution of the United States and Article 1 of the Constitution of the State of Wisconsin. In addition to incorporating the facts set forth in paragraphs 1 through 10 of the amended complaint, the second cause of action states in paragraph 12:

> "12. Certain teachers who appeared before the Board without representation by the Association, have been treated differently from the employees who appeared before the Board represented by the Association. Said teachers who appeared before the Board without representation were offered employment opportunities and conditions of employment not offered to the teachers who were represented by the Association before the Board."

To this cause of action the defendants have demurred on the ground that sufficient facts are not stated to constitute a cause of action.

The umbrella of equal protection covers a limitless number of situations and as such is incapable of a single precise definition. However, equal protection can be defined in the following general language:

> "It has been repeatedly said that the guaranty of the

> equal protection of the law means that no person or class of person shall be denied the same protection of the laws which is enjoyed by other persons or other classes in like circumstances, in their lives, liberty, and property and in pursuit of happiness." 16 Am Jur 2nd Constitutional Law Sec. 87, p. 848

As this Court views the plaintiffs' second cause of action it is alleged therein that certain teachers who appeared before the Hortonville Board of Education were offered employment opportunities not offered to teachers who were represented by the Hortonville Education Association. The Court in Griffin vs. County School Board of Prince Edward County, 377 U.S. 218, 230, 84 S. Ct. 1226, 1233, 12 L. Ed. 256 (1964):

> "Indeed, showing that different persons are treated differently is not enough, without more, to show a denial of equal protection."

This Court in considering a demurrer must liberally contrue the pertinent portions of the plaintiffs' amended complaint and give the plaintiffs the benefit of all reasonable inferences which can be drawn from the properly pleaded facts. Continental Bank and Trust Co. vs. Akwa (1973), 58 Wis. 2nd 376; 206 NW 2nd 174. Using the foregoing standard, this Court fails to find any facts set forth in the amended complaint which, if proven, would show that the teachers offered employment and those not offered employment were in like or similar circumstances, or that any distinction made between them by the Board of Education was for a constitutionally impermissible reason.

Therefore, this Court deems the plaintiffs not to have

stated a cause of action and the defendants' demurrer to the plaintiffs' second cause of action must be sustained.

DECISION ON DEMURRER TO THIRD CAUSE OF ACTION:

The plaintiffs' third cause of action is based on an alleged violation of Wisconsin's Open Meeting Law, Sec. 66.-77 of the Wisconsin Statutes. The pertinent paragraph with respect to the plaintiffs' third cause of action is paragraph 15 which alleges:

> "15. On April 2, 1974, the Board, its administrators and agents, met and held a special meeting at which they considered, decided and acted to terminate the employments of the plaintiffs and other teachers similarly situated. No notice of said special meeting was ever given to the plaintiffs, or any other teachers similarly situated nor to the public."

The foregoing allegation clearly demoninates the meeting of April 2, 1974 as one at which the Hortonville Board of Education considered the employment and dismissal of the members of the plaintiff class. In addition, the April 2, 1974 meeting was held after the disciplinary hearings held on April 1, 1974 as set forth in earlier portions of the plaintiffs' complaint. The Statute in question recognizes that it is in the public's interest to have governmental affairs conducted within the public's view and therefore provides for many types of open governmental meetings. However, there are six exceptions to that policy and two of those exceptions are pertinent to this case. Sec. 66.77(3) provides in part:

> "(a) Deliberting after judicial or quasi judicial trial or hearing.

> (d) Considering employment, dismissal, promotion, demotion, compensation, licensing or discipline of any public employee or person licensed by a state board or commission or the investigation of charges against such person, unless an open meeting is requested by the employee or the person charged, investigated or otherwise under discussion."

The meeting of April 2, 1974 as set forth in the plaintiffs' complaint clearly falls within the aforementioned exceptions. The meeting was held subsequent to a quasi-judicial hearing and the employment or dismissal of the plaintiff class was decided at that particular meeting. If the plaintiff class had wanted such a meeting to be open to the public they need have only requested the same as provided in Sec. 66.77(3)(b). The complaint does not allege that the plaintiff class made such a request for an open meeting.

Therefore this Court deems the plaintiffs not to have stated a cause of action and the defendants' demurrer to the plaintiffs' third cause of action must be sustained.

DECISION ON DEMURRER TO FOURTH CAUSE OF ACTION:

The plaintiffs base their fourth cause of action on a theory that replacement teachers hired by the Hortonville Board of Education were hired in violation of Secs. 118.-19, 118.21 and 118.25 of the Wisconsin Statutes. With respect to the fourth cause of action there are two pertinent paragraphs:

> "18. On information and belief, the Board, its administrators and agents, have hired, and are hiring

permanent replacement for the plaintiffs and other teachers similarly situated, for both the 1973-1974 and 1974-1975 school years. It is the intention of the Board, its administrators and agents to hire permanent replacements for all plaintiffs and others similarly situated."

"19. On information and belief, said permanent replacements have been hired, and are being hired, in violation of Sections 118.19, 118.21 and 118.25, Wis. Stat. Said hirings, and the teaching contracts entered into between the Board and the permanent replacements, are in violation of the Wisconsin Statutes, and they are null and void."

Section 118.19 Stats. sets forth the requirements for teachers' certificates and licenses. Section 118.21 Stats. requires individual written contracts between teachers and school boards together with related items such as compensation, filing of a statement showing the date of expiration, and the grade character of certificate or license held, travel expenses and educational conventions. Sec. 118.25 Stats. provides for required health examinations of various school personnel.

The foregoing statutes are written in precise detail but when looking at the plaintiffs' fourth cause of action as alleged in the amended complaint this Court is unable to find any facts similarly detailed. There is absolutely no factual basis whatsoever set forth in the plaintiffs' fourth cause of action to support the conclusion that the foregoing statutes have been violated.

Accordingly the demurrer to the plaintiffs' fourth cause of action must be sustained.

Inasmuch as leave will be granted to replead the fourth cause of action, this Court in view of possible proper factual allegations at a future date deems it premature to decide whether there is a defect of parties as was raised by the demurring defendants.

SUMMARY:

(1) The demurrer to the plaintiffs' second cause of action in the amended complaint must be sustained. The plaintiffs are granted leave to re-plead their second cause of action within ten (10) days upon payment of $50.00 costs.

(2) The demurrer to the plaintiffs' third cause of action in the amended complaint must be sustained. No leave is granted to replead this cause of action.

(3) The demurrer to the plaintiffs' fourth cause of action in the amended complaint must be sustained. Leave is granted to replead this cause of action, without additional costs.

Counsel for the defendants are directed to prepare an order consistent with the foregoing decision and present the same to this Court for signature within fifteen (15) days from today, after obtaining approval of plaintiffs' counsel as to form.

Dated: July 19, 1974

BY THE COURT:

/s/ ALLAN J. DEEHR
Circuit Judge

STATE OF WISCONSIN OUTAGAMIE COUNTY
CIRCUIT COURT

[Caption omitted in printing]

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT TO FIRST CAUSE OF ACTION

Case No. 17291

The above entitled action having been heard on the 27th day of June, 1974, by the court at the courthouse in the City of Appleton, on motion of Jack D. Walker, one of the attorneys for defendants, for summary judgment for the defendants; and the defendants appearing by their attorneys, Jack D. Walker and James K. Ruhly, of Melli, Shiels, Walker & Pease, S.C., in support of said motion, and plaintiffs appearing by their attorney, Bruce F. Ehlke, of Lawton & Cates, in opposition to said motion, and the court having heard the arguments of counsel and having read and considered the affidavit of Roger Weihing in support of said motion and the affidavit of Michael Wisnoski in opposition thereto; and the court further having reviewed and considered the briefs submitted by counsel; and the court having filed a Decision On Defendants' Motion For Summary Judgment To First Cause Of Action on July 19, 1974;

IT IS ORDERED That the motion of the defendants for summary judgment pursuant to Section 270.635, Wisconsin Statutes, be, and the same hereby is, granted; and that judgment be entered for the defendants and against the plaintiffs dismissing the First Cause of Action of the plaintiffs on its merits with prejudice, and for defendants' costs and taxable disbursements herein.

Dated this 26th day of July, 1974.

BY THE COURT:

/s/ ALLAN J. DEEHR
Judge

[Approval as to form omitted in printing]

STATE OF WISCONSIN OUTAGAMIE COUNTY
CIRCUIT COURT

[Caption omitted in printing]

ORDER SUSTAINING DEMURRERS TO SECOND CAUSE OF ACTION, THIRD CAUSE OF ACTION AND FOURTH CAUSE OF ACTION

Case No. 17291

The above entitled matter having been heard on the 27th day of June, 1974, pursuant to demurrers brought by defendants alleging that the second, third and fourth causes of action of the plaintiffs' amended complaint do not state facts sufficient to constitute causes of action; and the plaintiffs appearing by their attorney Bruce F. Ehlke, of Lawton & Cates; and defendants appearing by their attorneys, Jack D. Walker and James K. Ruhly, of Melli, Shiels, Walker & Pease, S.C.; and the Court having heard the arguments of counsel, and briefs having been submitted to the Court and the Court having reviewed said briefs; and the Court having filed a Decision On Demurrers To Second, Third and Fourth Causes Of Action on July 19, 1974;

IT IS ORDERED That the demurrer to the second cause of action in the amended complaint be and hereby is sustained, and plaintiffs are granted leave to re-plead said second cause of action within ten (10) days from July 19, 1974, upon payment of $50.00 costs to defendants.

IT IS FURTHER ORDERED That the demurrer to the third cause of action in the amended complaint be and hereby is sustained, without leave to re-plead said cause of action.

IT IS FURTHER ORDERED That the demurrer to the fourth cause of action in the amended complaint be and hereby is sustained, and plaintiffs are granted leave to re-plead said fourth cause of action within ten (10) days from July 19, 1974, without additional costs.

Dated this 26th day of July, 1974.

BY THE COURT:

/s/ ALLAN J. DEEHR
Judge

[Approval as to form omitted in printing]

STATE OF WISCONSIN OUTAGAMIE COUNTY

CIRCUIT COURT

[Caption omitted in printing]

JUDGMENT DISMISSING FIRST CAUSE OF ACTION

The motion of the defendants in the above entitled action for summary judgment to first cause of action in amended complaint, for the defendants and against the plaintiffs, pursuant to Section 270.635, Wisconsin Statutes, having been duly heard and considered, and said motion having been granted by the Court,

NOW THEREFORE, on motion of Jack D. Walker, one of the attorneys for the defendants,

IT IS ADJUDGED, That the defendants have judgment dismissing the first cause of action of the plaintiffs on its merits and with prejudice and for its costs and taxable disbursements herein as follows:

Costs: $100.00
Taxable Disbursements: $573.01

Dated August 27, 1974.

BY THE COURT:

/s/ RUTH H. JANSSEN
Deputy Clerk

STATE OF WISCONSIN OUTAGAMIE COUNTY
CIRCUIT COURT

[Caption omitted in printing]

NOTICE OF ENTRY OF JUDGMENT
Case No. 17291

TO: Attorney Bruce F. Ehlke
Lawton & Cates
110 East Main Street
Madison, Wisconsin 53703
Attorneys for Plaintiffs

PLEASE TAKE NOTICE That a judgment of which a true and correct copy is hereto attached, was signed by the Deputy Clerk of Court, Ruth H. Janssen, on the 27th day of August, 1974 and duly entered in the Circuit Court for Outagamie County, Wisconsin, on the 27th day of August, 1974.

Dated at Madison, Wisconsin, this 28th day of August, 1974.

JAMES K. RUHLY
MELLI, SHIELS, WALKER & PEASE, S.C.
Attorneys for Defendants

[Caption omitted in printing]

JUDGMENT DISMISSING FIRST
CAUSE OF ACTION

The motion of the defendants in the above entitled action for summary judgment to first cause of acton in

amended complaint, for the defendants and against the plaintiffs, pursuant to Section 270.635, Wisconsin Statutes, having been duly heard and considered, and said motion having been granted by the Court,

NOW THEREFORE, on motion of Jack D. Walker, one of the attorneys for the defendants,

IT IS ADJUDGED, That the defendants have judgment dismissing the first cause of action of the plaintiffs on its merits and with prejudice and for its costs and taxable disbursements herein as follows:

Costs: $100.00
Taxable Disbursements: $573.01

Dated August 27, 1974

BY THE COURT:

/s/ RUTH H. JANSSEN
Clerk

STATE OF WISCONSIN
IN SUPREME COURT

STATE ex rel HORTONVILLE EDUCATION ASSOCIATION and MICHAEL WISNOSKI, on behalf of themselves and all other similarly situated petitioners,

Petitioners,

vs.

CIRCUIT COURT FOR OUTAGAMIE COUNTY, ALLAN J. DEEHR, CIRCUIT JUDGE, PRESIDING: HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; BOARD OF EDUCATION OF HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; ROGER WEIHING, ROBERT HAUK, JEAN MEADS, FLOYD MEYER, MERLIN PLAMANN, VICTOR SCHROTH, and RONALD SURPRISE, individually and as officers and members of the BOARD OF EDUCATION OF HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; and MARVIN OBRY, ROBERT KOHLS and GENE RIEDL, individually and as administrators of HORTONVILLE JOINT SCHOOL DISTRICT NO. 1,

Respondents.

VERIFIED PETITION FOR LEAVE TO COMMENCE AN ORIGINAL ACTION FOR DECLARATORY JUDGMENT, A WRIT OF PROHIBITION, MANDAMUS, OR OTHER APPROPRIATE RELIEF

The petitioners, by their attorneys SAMSON, FRIEBERT, FINERTY & BURNS by ROBERT H. FRIEBERT, hereby allege as follows:

1. That the petitioner, the HORTONVILLE EDUCATION ASSOCIATION, is a teachers' union which, prior to March 18, 1974 was the duly qualified representative and bargaining agent for all teachers under contract with the Respondent, the HORTONVILLE JOINT SCHOOL DISTRICT NO. 1.

2. That the petitioner, MICHAEL WISNOSKI, is a qualified teacher, duly certified as such by the State of Wisconsin, who was, prior to April 2, 1974, a teacher under contract with the HORTONVILLE JOINT SCHOOL DISTRICT NO. 1, and that he has been determined to be a proper representative of a class of teachers similarly situated in a decision by the respondent, CIRCUIT COURT FOR OUTAGAMIE COUNTY, Allan J. Deehr, Circuit Judge, Presiding, dated July 19, 1974. See Exhibit A.

3. That the class above referred to contains eighty-eight (88) members who are all teachers certified by the State of Wisconsin and who were, prior to April 2, 1974, employed by the respondent HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; that because the said class is so numerious, joinder of all members is impracticable; that there are questions of law and fact common to the class; that the claims of the representative, MICHAEL WISNOSKI, are typical of the claims of the class; that the representative, MICHAEL WISNOSKI, will fairly and adequately protect the interests of the class; that the respondents have acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief and corresponding declaratory relief with repect to the class as a whole; that the questions of law and fact common to the members of the class predominate over any

questions affecting only individual members; and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

4. That the respondent, through Circuit Judge Allan J. Deehr, is the CIRCUIT COURT FOR OUTAGAMIE COUNTY and, as such, entertained jurisdiction over a suit entitled HORTONVILLE EDUCATION ASSOCIATION and MICHAEL WISNOSKI, et al, plaintiffs v. HORTONVILLE JOINT SCHOOL DISTRICT NO. 1, et al, defendants.

5. That the respondent HORTONVILLE JOINT SCHOOL DISTRICT NO. 1, is ta territorial unit for school administration existing pursuant to Chapter 115-121, Wis. Stats.

6. That the respondent, BOARD OF EDUCATION OF HORTONVILLE JOINT SCHOOL DISTRICT NO. 1, is the School Board or Board of Education in charge of the schools of the Hortonville Joint School District No. 1 pursuant to Chapter 115-121, Wis. Stats.

7. That the respondents, ROGER WEIHING, ROBERT HAUK, JEAN MEADS, FLOYD MEYER, MERLIN PLAMANN, VICTOR SCHROTH and RONALD SURPRISE are the officers and members of the aforesaid BOARD OF EDUCATION OF HORTONVILLE JOINT SCHOOL DISTRICT NO. 1.

8. That the respondents, MARVIN OBRY, ROBERT KOHLS and GENE RIEDL are the administrators of the HORTONVILLE JOINT SCHOOL DISTRICT NO. 1 and act as the administrative heads of the school district pursuant to Chapter 115-121, Wis. Stats.

9. That the subject matter of this lawsuit is generally known as the Hortonville strike which is a matter of statewide concern and interest.

10. For purposes of this petition, your petitioners do not dispute any of the facts of this case as contained in the two decisions of the respondent, Judge Deehr, dated July 19, 1974, copies of which are attached as Exhibits A and B and incorporated herein by reference.

11. That, briefly summarized, the facts are as follows:

(a) Commencing at some time prior to March 18, 1974, the petitioners and the respondents other than the Circuit Court for Outagamie County, engaged or attempted to engage in collective bargaining to reach a collective bargaining agreement pursuant to Wisconsin law.

(b) The parties were unable to agree upon a collective bargaining agreement.

(c) Your petitioners were of a belief that the reason for the failure to reach an agreement was because the respondents other than the Circuit Court of Outagamie County, refused to bargain in good faith and that the respondents other than the Circuit Court for Outagamie County were attempting to destroy the effectiveness of the petitioner, Hortonville Education Association, in violation of Sec. 111.70(3), Wis. Stats. The respondents, other than the Circuit Court for Outagamie County, deny that they refused to bargain in good faith or that they were attempting to destroy the effectiveness of the petitioner, Hortonville Education Association.

(d) In response to their beliefs that the respondents other than the Circuit Court for Outagamie County were engaging in prohibited practices, the petitioners as represented by Michael Wisnoski commenced a strike on March 18, 1974.

(e) Subsequent to March 18, 1974, any teacher employed by the respondents other than the Circuit Court for Outagamie County who disassociated himself from the petitioners was offered terms and conditions of employment with the Hortonville Joint School District No. 1.

(f) The respondents other than the Circuit Court for Outagamie County at no time sought judicial intervention to enforce Sec. 111.70 (3) (1), Wis. Stats. which prohibits strikes by municipal employees and thus, no impartial, detached and neutral decisionmaker was ever asked to in any way enjoin the strike.

(g) On April 2, 1974, the Hortonville Board of Educaction terminated the employment of all members of the plaintiff class who remained associated with the Hortonville Education Association.

(h) Hearings preceded these firings and these hearings were conducted by the respondent, Board of Education of Hortonville Joint School District No. 1.

(i) At this hearing, your petitioners challenged the impartiality of the respondent, Board of Education of Hortonville Joint School District No. 1, to conduct disciplinary hearings because it was a combatant in this dispute. This objection was denied.

(j) The petitioners attempted to assert at this disciplinary hearing for purposes of defense and/or for purposes of mitigation of penalty that this dispute was caused by the intransigence of their judges. Your petitioners attempted to do this by calling the individual respondents as witnesses. Said request and said defenses were denied by the respondent, Board of Education, and your petitioners were all found guilty and fired forthwith.

(k) The sole basis for the disciplinary action and firing was the fact that your petitioners had engaged in a strike.

12. That your petitioners brought several causes of action against all of the respondents other than the CIRCUIT COURT FOR OUTAGAMIE COUNTY before the respondent CIRCUIT COURT FOR OUTAGAMIE COUNTY, and, in those causes of action asserted, inter alia, the following:

(a) That municipal employees can strike if there is just cause for the strike, such as the refusal of the municipal employer to bargain in good faith or that the employer is attempting to destroy the union which represents the employees.

(b) That the respondent, Board of Education of Hortonville Joint School District No. 1, was not an impartial, neutral and detached decisionmaker to determine whether your petitioners should be subjected to disciplinary action because they allegedly engaged in a strike.

(c) That the respondent, Board of Education of Hortonville Joint School District No. 1, is not an impartial, neutral and detached decisionmaker to determine the punishment which should be meted out to any person who is found by them to have engaged in a strike because they were a combatant in this dispute.

(b) That the respondent, Board of Education of Hortonville School District No. 1, violated the petitioners' rights to equal protection of the law because they fired all persons who were represented by the attorneys for the petitioner, Hortonville Education Association, while at the same time offered employment opportunities and conditions of employment to persons who had formerly associated themselves with your petitioner, Hortonville Education Association, but who had subsequently disassociated themselves from the petitioner, Hortonville Education Association.

13. That the respondent, CIRCUIT COURT FOR OUTAGAMIE COUNTY, in two decisions dated July 19, 1974 (Exhibits A and B) ruled as follows:

(a) There can be no just cause for a strike by municipal employees.

(b) The respondent, Board of Education of Hortonville Joint School District No. 1, was an appropriate hearing body because there was no defense to the action of striking and, therefore, any bias on the part of the respondent, Board of Education of Hortonville Joint School District No. 1, was irrelevant.

(c) That the mere fact that the respondent, Board of Education of Hortonville Joint School District No. 1,

treated teachers who were associated with the petitioner, Hortonville Education Association, differently than the way it treated persons who were formerly associated with the Hortonville Education Association did not present a sufficient allegation of a denial of equal protection of the laws.

14. That your petitioners ask for a declaration and the entry of appropriate orders with respect to the following:

(a) That Sec. 111.70(1), Wis. Stats. which ostensibly prohibits strikes by all county or municipal employees constitutes a denial of due process and equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution in that the legislative grouping of all municipal and county employees into one class without regard to the function and relationship of the employees to the health and safety of the community constitutes an improper classification vis a vis the purposes sought to be achieved by this legislation and that your petitioners are not employed in any capacity which has any bearing upon the health and safety of the people of Hortonville.

(b) That in any event, municipal employees can engage in a strike if it is in response to prohibited practices on the part of the municipal employer and, municipal employees can assert such defense before an impartial, neutral and detached decisionmaker.

(c) If it is determined that municipal employees can be absolutely prohibited from striking and that there was no just cause for the strike, then your petitioners are entitled to a determination of penalty by an inde-

pendent, neutral and detached decisionmaker and the penalty to be imposed is not necessarily firing from employment but, this decisionmaker has a wide variety of available penalties which it may impose, including, no penalty, warning, reprimand, suspension and firing.

(d) That the respondent, Hortonville Joint School District No. 1, is not an independent, neutral and detached decision maker with respect to determining whether any of the petitioners engaged in a prohibited activity and, therefore, your petitioners have been denied a decision which comports with due process and equal protection of the laws as guaranteed by the Fourteenth Amendment.

(e) That the Board of Education of Hortonville Joint School District No. 1 was not an independent, neutral and detached decisionmaker to determine the penalty, if any, to be imposed upon any of your petitioners in violation of rights guaranteed to your petitioners by the Fourteenth Amendment to the United States Constitution.

(f) That the action of the respondent, Board of Education of Hortonville Joint School District No. 1, in treating persons who had struck who were not represented by the petitioner, Hortonville Education Association, more favorably than persons who were presented by the petitioner, Hortonville Education Association, constitutes a violation of due process and equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution as well as constituting a violation of Sec. 111.70(3)(a), Wis. Stats.

(g) That Sec. 111.70(j)(m), Wis. Stats. which provides for binding arbitration for resolution of municipal labor disputes involving members of the Milwaukee Police Department constitutes a discriminatory class and denies to your petitioners due process and equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution in that your petitioners who are municipal employees who are not involved with the health and safety of the community of Hortonville are denied the benefits of compulsory arbitration and, at the same time are denied the right to strike.

15. That the issues which were presented to the respondent, CIRCUIT COURT FOR OUTAGAMIE COUNTY, were more numerous than the ones presented here, some issues presented here were not presented below, and, an appeal will come too late for effective redress of these grievances and will be inadequate for the school year of 1974-1975 and there is a need for immediate intervention by this Court to avoid great hardship and the effective denial of the rights guaranteed to the petitioners as asserted in this petition and there is presented questions of great and immediate public concern.

WHEREFORE, your petitioners and the class represented by your petitioners respectfully request that this Court enter an appropriate order directing the respondents to show cause why this Court should not grant the petitioners' request for original jurisdiction and the petitioners' re-

quest for the declaration of rights and entry of appropriate orders and writs to effectuate the decision of this Court.

SAMSON, FRIEBERT, FINERTY & BURNS
Attorneys for Petitioners

[Exhibits A and B omitted, printed at pages A-172-A-203 and A- 203-A-209 of this Appendix]

[Verification omitted]

STATE OF WISCONSIN
IN SUPREME COURT

[Caption omitted in printing]

ORDER TO SHOW CAUSE

Upon the petition of HORTONVILLE EDUCATION ASSOCIATION and MICHAEL WISNOSKI, by their attorneys, SAMSON, FRIEBERT, FINERTY & BURNS, by ROBERT H. FRIEBERT,

IT IS ORDERED:

That the respondents and each of them appear and show cause, if any they have, on the 23rd day of September, 1974 at 11 o'clock in the forenoon as to why this Court should not grant said petition and take original jurisdiction in this action.

Let a copy of this order and the petition be served upon all of the respondents and the Attorney General of the State of Wisconsin pursuant to Sec. 269.56(11), Wis. Stats. no later than the 16 day of September, 1974.

Dated at Madison, Wisconsin this 10th day of September, 1974.

/s/ HORACE W. WILKIE
Chief Justice
Wisconsin Supreme Court

STATE OF WISCONSIN
IN SUPREME COURT

[Caption omitted]

ORDER

The Order to Show Cause as to why this Court should not take jurisdiction in the original action proposed by petitioners herein having come on for hearing before the Court on September 23, 1974.

And it appearing that the time for appeal in the related matter of Hortonville Education Association and Michael Wisnoski et al v. Hortonville Joint School District No. 1 et al, has not expired,

IT IS ORDERED that if an appeal is taken from the trial court's determination in that case, it shall be filed and perfected in this Court on or before October 15, 1974, and upon such filing appellants' brief shall be served and filed on or before October 21, 1974, respondents' brief shall be served and filed on or before November 18, 1974, appellants' reply brief shall be served and filed on or before November 27, 1974, and that appeal will be assigned for oral argument during the December call. All of the briefs shall be served and filed in typewritten form to be followed by printed briefs.

IT IS FURTHER ORDERED that the petition for original action herein is denied.

Dated at Madison, Wisconsin, this 24th day of September, 1974.

BY THE COURT
/s/ ROBERT O. UEHLING
Robert O. Uehling
Clerk of Supreme Court

(SEAL)

STATE OF WISCONSIN OUTAGAMIE COUNTY
CIRCUIT COURT

HORTONVILE EDUCATION ASSOCIATION and MICHAEL WISNOSKI, ROSE MARIE OLSON, THOMAS NADEAU, JUDY MURPHY, RUSSEL LICHTE and RONALD HAMMOND,

Plaintiffs,

vs.

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; BOARD OF EDUCATION OF HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; ROGER WEIHING, ROBERT HAUK, JEAN MEADS, FLOYD MEYER, MERLIN PLAMANN, VICTOR SCHROTH and RONALD SURPRISE, individually and as officers and members of the Board of Education of Hortonville Joint School District No. 1; and MARVIN OBRY, ROBERT KOHLS and GENE RIEDL, individually and as administrators of Hortonville Joint School District No. 1,

Defendants.

NOTICE OF APPEAL

TO: CLERK OF CIRCUIT COURT
Outagamie County Courthouse
Appleton, Wisconsin 54911

MELLI, SHIELS, WALKER & PEASE, S.C.
Attorneys at Law
309 Insurance Building
Madison, Wisconsin 53703
Attorneys for Defendants

PLEASE TAKE NOTICE that the plaintiffs above named, by their attorneys SAMSON, FRIEBERT, FINERTY & BURNS, hereby appeal from the following particular aspects of the judgment entered against them in the above captioned case, notice of entry of judgment having been received on August 28, 1974:

(a) That portion of the judgment granting the defendants' Motion for Summary Judgment as to the First Cause of Action in the plaintiffs' Amended Complaint;

(b) That portion of the judgment sustaining the defendants' Demurrer to the Third Cause of Action in the plaintiffs' Amended Complaint.

Dated at Milwaukee, Wisconsin this 10 day of October, 1974.

SAMSON, FRIEBERT, FINERTY & BURNS
By /s/ ROBERT H. FRIEBERT
Attorneys for Plaintiffs

STATE OF WISCONSIN
IN SUPREME COURT

August Term, 1974 No.635

HORTONVILLE EDUCATION ASSN. et al.,

v.

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1, et al.,

Respondents.

OPINION OF WISCONSIN SUPPREME COURT

APPEAL from a judgment and an order of the circuit court for Outagamie county: ALLAN J. DEEHR, Circuit Judge of the Fourth circuit, Presiding. Judgment reversed, order affirmed.

This is a class action which grew out of a municipal labor dispute at Hortonville, Wisconsin, involving on one side the public school teachers in the Hortonville Joint School District No. 1 and their representative and bargaining agent, the Hortonville Education Association (HEA), and on the other side the Hortonville Joint School District No. 1 and its representative and bargaining agent, the Board of Education of Hortonville Joint School District No. 1.

The labor dispute began in January, 1974, over the 1973-1974 and the 1974-1975 teachers' contracts. Collective bargaining did not resolve the dispute and in March, 1974, a substantial number of teachers engaged in a strike. The school board discharged over 80 teachers represented by the appellant HEA. This action was commenced to declare

the action of the school board null and void and for reinstatement of the teachers.

The trial court granted the school board's motion for summary judgment as to the teachers' first cause of action and sustained the demurrers to the other three causes of action.

The appellants Michael Wisnoski, Rose Marie Olson, Thomas Nadeau, Judy Murphy, Russel Lichte and Ronald Hammond are teachers who were discharged by the board and represent all former Hortonville teachers similarly situated. Respondents Roger Weihing, Robert Hauk, Jean Meads, Floyd Meyer, Merlin Plamann, Victor Schroth and Ronald Surprise are members of the school board. Respondent Robert Kohls is the Hortonville High School principal. Respondent Eugene Riedl is the Hortonville Junior High School and Elementary School principal. Respondent Marvin Obry is superintendent of the district.

The material facts, as they appear from the pleadings, the affidavits and other documents filed in support of and in opposition to the motion for summary judgment, are not in dispute. In January, 1974, negotiations between the HEA and the school board were in progress to reach a collective bargaining agreement on 1973-1974 and 1974-1975 teaching contracts. From about January 24 to January 30, the HEA engaged in "informational picketing," which did not interrupt any teaching activities. On Monday, March 18, the teachers went on strike. On March 20, the school district superintendent, at the direction of the board, sent letters to the teachers inviting them to return to their jobs. Several teachers did return on Friday, March 22d.

On March 23rd, the superintendent, again at the direction of the board, sent a letter to each teacher again inviting

them to return to work and advising them that strikes by public employees were illegal and that the board would not "condone unlawful activity" by its employees. None of the 86 teaching employees then on strike returned to work in response to said letter. On Tuesday, March 26th, and Wednesday, March 27th, classes were conducted for most students through the use of substitute teachers.

At a special school board meeting on Friday, March 29th, the board decided to schedule disciplinary hearings for each individual teaching employee then on strike. Notices[1] of the individual hearings were addressed to each teaching employee and specified the purpose of the hearing and the time at which he or she was to appear. The hearings, which were scheduled twenty minutes apart, were to be held on Monday, April 1, Tuesday, April 2, and Wednesday, April 3. The notices were delivered to the Outagamie county sheriff's department on Friday, March 29th, with a request that they be served as soon as possible. Twenty-three of the notices were served on Friday, March 29th, forty-four were served on Saturday, March 30th, twenty on Monday, April 1st,

[1]"The Board of Education for the Hortonville Community Schools has been informed by Superintendent Obry that since March 18, 1974:

"You have breached your individual employment contract;

"You have engaged in an unlawful strike contrary to Wisconsin law.

"This alleged conduct, if true, subjects you to disciplinary action by the Board, including termination of your employment contract.

"You are hereby notified that the Board of Education has set a hearing on this matter for ——, April —, 1974, at — o'clock in the —— noon, or as soon thereafter as you may be heard, at the high school library, 246 North Olk Street, Hortonville.

"At this hearing you will be given the opportunity to present any statement or evidence relevant to this alleged conduct.

"Be further advised that after such hearing the Board will notify you in writing of what disciplinary action, if any, the Board has determined appropriate."

and one on Tuesday, April 2d. The HEA was not notified of the hearing.

On Monday morning, April 1st, almost all the teaching employees represented in this class action appeared before the board en masse with their retained counsel and indicated, through him, that they would refuse to answer questions that they did not want individual hearings but rather preferred to be treated as a group. Their counsel also objected, on due process grounds, that the teaching employees did not receive fair notice of the hearings and that they were entitled to an impartial decisionmaker to determine the appropriate disciplinary measures, if any. Counsel for the teachers alleged that the work stoppage was provoked by the board's conduct, and sought to examine members of the board to establish that fact. This request was refused, but counsel was allowed to make an offer of proof regarding the unsatisfactory nature of the board's contract offers, its allegedly coercive and unlawful bargaining techniques, and an allegation that teachers were locked out of their places of employment. The board refused to consider the offer of proof and the hearing adjourned at 1:20 p.m.

On Tuesday morning, April 2d, counsel for the teachers appeared before the board with four other teaching employees who had not appeared the previous day. These individuals all indicated that they took the same position as the other teachers and wished to be considered with the others.

On Tuesday afternoon, April 2d, the board held a special meeting at which it adopted a resolution terminating the employment of the teachers in the class represented by appellants here. Letters were sent to such teachers indicating that their employment was terminated and that their offers

of employment or contracts for the 1974-1975 school year were revoked or terminated.[2]

On April 5th the board held a hearing for a teacher who had erroneously been excluded from all prior action and proceeding. The teacher, through the counsel who represented the other teachers, indicated she wished to take the same position as the others, and was therefore discharged.

Thereafter, the board began hiring replacement teachers and school reopened on April 8, 1974. Only one of the discharged teachers reapplied for employment and he was rehired.

In the first cause of action in their amended complaint, the plaintiffs-appellants, the HEA and the named teachers-plaintiffs as class representatives, alleged that the circumstances of the hearing and discharge constituted a deprivation of their property and liberty without due process of law as guaranteed under the Fourteenth Amendment of the United States Constitution and art. I of the Wisconsin Constitution. In the third cause of action, the appellants alleged that conduct of the board on Tuesday afternoon, April 2d, constituted a violation of the open meeting law, sec. 66.77, Stats. The appellants sought, as relief, a declaration that the board's action was null and void, an order that the discharge of the teachers be set aside, an injunction proscribing the

[2]"Please be advised that the Board of Education met on April 2, 1974, and took the following action:

"The Board found you guilty of the conduct set forth in Mr. Weihing's notice of March 29, 1974. Specifically, it found that since March 19, 1974:

"You breached your individual employment contract;

"You engaged in strike activity contrary to Wisconsin law.

"Therefore, you are advised that your employment with the Hortonville Community Schools, Joint School District #1, Village of Hortonville, et al., is hereby terminated, effective immediately. Furtheremore, this action includes the withdrawal of the offer of employment for the 1974-75 school term, and/or termination of such tendered employment contract. Be further advised that your district-paid WPS hospital insurance coverage will cease on April 30, 1974, unless you make contrary arrangements with the insurance company. Information regarding other fringe benefits will be forthcoming to you in the near future.

"The Board also directed the administration to commence recruitment, both from within and outside the district, for professional staff for the balance of the 1973-74 school year and thereafter. You are invited to apply for any teaching position if you are interested in further employment in our district. You shou'd contact Superintendent Obry or a principal if you wish to so apply."

board from hiring additional replacements, an order that the contracts of the replacements be rescinded, an order requiring the parties to select an impartial decisionmaker to determine whether there was "just cause" for the discharge, and such other relief as might be appropriate.

The trial court granted the respondent-school board's motion for summary judgment on the first cause of action and sustained its demurrer to the third. The other causes of action stated in the amended complaint are not at issue here.

The plaintiffs appeal from the judgment and order.

BEILFUSS, J. The issues in this court are:

1. Does Wisconsin law allow the discharge of municipal employees who engage in a strike?

2. Does the action by the Hortonville school board in discharging teachers instead of obtaining a judicial order constitute selective enforcement of the Wisconsin prohibition of the right to strike, thereby denying to the teachers their right to equal protection of the laws?

3. Does the state's prohibition against strikes by teachers, without provision for binding arbitration and de novo review of reasonableness of punishment, when such benefits are provided for other public employees, constitute a viola-

tion of the equal protection clause of the Fourteenth Amendment to the United States Constitution?

4. Were the strikers denied due process of law because they were discharged by the Hortonville school board which is not a neutral, impartial and detached decisionmaker?

5. Did the action taken by the Hortonville board of education constitute a violation of the open meeting law?

The general rule is that issues not presented to the trial court will not be considered for the first time on appeal. Estate of Scherffius (1974), 62 Wis. 2d 687, 696, 697, 215 N.W. 2d 547; Resseguie v. American Mut. Liability Ins. Co. (1971), 51 Wis. 2d 92, 103, 104, 186 N.W. 2d 236. With respect to constitutional issues, this court had said it may, in its discretion, consider such issues for the first time on appeal if it is in the interest of justice to do so and there are no unresolved factual issues. State v. Morales (1971), 51 Wis. 2d 650, 654, 187 N.W. 2d 841; Bradley v. State (1967), 36 Wis. 2d 345, 359, 359a, 153 N.W. 2d 38, 155 N.W. 2d 564. We believe, in this case, it is in the interest of justice to consider the issues raised as set forth above.

Does Wisconsin law allow the discharge of municipal employees who engage in a strike?

As to all municipal employees, sec. 111.70 (4) (1), Stats., provides:

"Strikes prohibited. Nothing contained in this subchapter shall constitute a grant of the right to strike by any county or municipal employe and such strikes are hereby expressly prohibited."

As to state employees, sec. 111.89, Stats., provides:

"Strike prohibited. (1) Upon establishing that a strike is in progress, the employer may at his option either seek an injunction or file an unfair labor practice charge with the

commission under s. 111.84 (2) (e) or both. In this regard it shall be the responsibility of the department of administration to decide whether to seek an injunction or file an unfair labor practice charge. The existence of an administrative remedy shall not constitute grounds for denial of injunctive relief.

"(2) The occurrence of a strike and the participation therein by a state employe do not affect the rights given to the employer to deal with the strike, including:

"(a) The right to impose discipline, including discharge, or suspension without pay, of any employe participating therein;

"(b) The right to cancel the reinstatement eligibility of any employe engaging therein; and

"(c) The right of the employer to request the imposition of fines, either against the labor organization or the employe engaging therein, or to sue for damages because of such strike activity."

The appellants contend that since employers of state employees are specifically given the right to discharge in the event of a strike, while no similar provision applies to municipal employees, that municipal employees are not allowed to discharge striking employees but are restricted to the remedy of injunction.

The respondents cite Millar v. Joint School Dist. (1957), 2 Wis. 2d 303, 312, 86 N.W. 2d 455, for the proposition that:

"A school board has implied power to dismiss a teacher before the expiration of his term of service for good and sufficient cause. . . . If a teacher fails to perform his duties

under his contract, the board may discharge him from further service."

They further contend that sec. 111.70 (4) (1), Stats., in no way diminishes that right. We believe they are correct in that contention. Sec. 118.22 (2) provides:

"On or before March 15 of the school year during which a teacher holds a contract, the board by which the teacher is employed or an employe at the direction of the board shall give the teacher written notice of renewal or refusal to renew his contract for the ensuing school year. If no such notice is given on or before March 15, the contract then in force shall continue for the ensuing school year. A teacher who receives a notice of renewal of contract for the ensuing school year, or a teacher who does not receive a notice of renewal or refusal to renew his contract for the ensuing school year on or before March 15, shall accept or reject in writing such contract not later than the following April 15. No teacher may be employed or dismissed except by a majority vote of the full membership of the board. Nothing in this section prevents the modification or termination of a contract by mutual agreement of the teacher and the board. No such board may enter into a contract of employment with a teacher for any period of time as to which the teacher is then under a contract of employment with another board."

The reference to the fact that a teacher may be "dismissed" clearly indicates the existence of the right to discharge. Both Millar, supra, and Richards v. Board of Education (1973), 58 Wis. 2d 444, 460b, 206 N.W. 2d 597, indicate clearly that the term "dismiss" means to remove from employment and not to merely refuse to renew a contract.

Furthermore, the power of the board to discharge a teacher for "just cause" is clearly preserved in the master contract[3] between HEA and the school district.

From the statutes, the cases cited, and the contract, we conclude the school board did have the power to discharge the teachers who engaged in the prohibited strike.

The appellants contend the action by the Hortonville school board in discharging the teachers instead of obtaining a judicial order constitutes selective enforcement of the Wisconsin prohibition of the right to strike, thereby denying to the teachers their right to equal protection of the laws as guaranteed by the state and federal constitutions.

The appellants argue that this is the first known instance in Wisconsin where striking teachers have been discharged. They assert that the usual procedure is for the school board to seek an injunction, and that the deviation from this practice in this case amounts to selective enforcement of the law and a denial of equal protection.

The respondents, in argument, deny this is the first instance of discharge because of strike activity. They also urge that there is an unresolved factual dispute involved, i.e., what is the normal procedure in the case of teacher strikes. For the purpose of this opinion, we will assume the factual allegation of the appellants is correct.

Several factors bear on the question of whether the discharge amounted to a denial of equal protection due to selective enforcement of the law. The basic question that must be answered in the affirmative before a denial of equal protection can be found is whether a difference in treatment

[3]The master agreement, while contained in the record at pages 214-225, was not part of or appended to either of the affidavits filed with respect to the motion for summary judgment. However, because we have decided to determine the issues raised upon appeal, this document should be considered.

amounts to invidious discrimination. Harper v. Virginia Board of Elections (1966), 383 U.S. 663, 666, 86 Sup. Ct. 1079, 16 L. Ed. 2d 169.

Arguably at least, there were other remedies the school board could have pursued. It could have sought an injunction, it could have sought fact-finding and mediation before the Wisconsin Employment Relations Commission,[4] it could have continued collective bargaining or it could have discharged the teachers for violating the statutory prohibition against public employee strikes as was done here. The fact that the school board pursued one of the remedies does not ipso facto mean the teachers were denied equal protection. This is especially true in this case because we do not have a record which reveals all the pertinent and relevant facts upon which the board acted. What might be a fair and reasonable response on the part of the board might not be under a different factual background. Further, the right to discharge here is essentially contractual. Whether the master contract between the board and the school district and the contracts between the individual school teachers and the districts are comparable cannot be determined from the record in this case.

With one exception not material here, all of the striking teachers were treated the same. They were all given the same notices, all had the same opportunity to be heard, all were discharged and all given the right to apply for reinstatement. The record does not reveal invidious discrimination and no denial of equal protection appears.

The appellants also contend that they were denied equal protection of the law in two additional respects: First, in that they are denied the right to strike, contrary to their counter-

[4]Sec. 111.70, Stats. *See also, Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B.* (1967), 35 Wis. 2d 540, 151 N.W. 2d 617.

part in the private sector; and, second, in that they are denied certain benefits, e.g., binding arbitration, which are accorded to other public employees, i.e., police and firemen.

Absent a suspect classification or a fundamental right, neither of which are involved in this case,[5] this court has held that:

". . . to declare an act of the legislature as to a classification violative of the equal-protection clause, it is first necessary to prove that the legislature has abused its discretion beyond a reasonable doubt." State ex rel. La Follette v. Reuter (1967), 36 Wis. 2d 96, 111, 153 N.W. 2d 49. See also, Wiener v. J. C. Penney Co. (1974), 65 Wis. 2d 139, 147, 222 N.W. 2d 149.

There is a strong presumption of constitutionality which attaches to acts of the legislature, unless the court can say that no statement of facts can reasonably be conceived that would sustain it. Wiener, supra, page 147; State ex rel. Hammermill Paper Co. v. La Plante (1973), 58 Wis. 2d 32, 46, 205 N.W. 2d 784. Only if a classification is arbitrary and has no reasonable purpose or reflects no justifiable public policy will it be held violative of constitutional guarantees of equal protection. Simanco, Inc. v. Department of Revenue (1973), 57 Wis. 2d 47, 57, 203 N.W. 2d 648. In Wiener, supra, page 147, this court reiterated five standards necessary for a proper classification:

"(1) All classifications must be based upon substantial distinctions which make one class really different from another.

[5]*See Warshafsky v. The Journal Co.* (1974), 63 Wis. 2d 130, 216 N. W. 2d 197; *United Federation of Postal Clerks v. Blount* (D.C. D.C. 1971), 325 Fed. Supp. 879, affirmed (1971), 404 U.S. 802, 92 Sup. Ct. 80, 30 L. Ed. 2d 38.

"(2) The classifications adopted must be germane to the purpose of the law.

"(3) The classifications must not be based upon existing circumstances only. They must not be so constituted as to preclude additions to the numbers included within a class.

"(4) To whatever class a law may apply, it must apply equally to each member thereof.

"(5) The characteristics of each class should be so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation." See also, Dane County v. McManus (1972), 55 Wis. 2d 413, 423, 198 N.W. 2d 677; State ex rel. Ford Hopkins Co. v. Mayor (1937), 226 Wis. 215, 222, 276 N.W. 311.

Considering appellants' contentions in reverse order, they claim that teachers are denied equal protection because, unlike police and firemen, they are not accorded binding arbitration[6] or other dispute settlement rights. The different treatment accorded police and firemen is "based upon substantial distinctions which make no class really different from another." Wiener, supra, page 147. It is not difficult to find a rational basis for the legislation. If police or firemen go on strike the imminent and immediate danger to the community is so great that every reasonable measure must be taken to get them back on the job as soon as possible, or to prevent them from striking in the first instance. The classification is not unreasonable and is a legitimate exercise of the legislative function.

[6]*See* secs. 111.70 (4) (jm) and 111.77, Stats.

A more difficult question arises with respect to the appellants' contention that they are denied equal protection, vis-a-vis nonpublic employees, by the application of the strike ban contained in sec. 111.70 (4) (l), Stats.

Several rationales are typically propounded in support of no-strike laws for public employees. One relies on the sovereignity of the governmental employee and reasons that the government, unlike the private employee, cannot suspend operations nor go out of business nor increase its budgets, and therefore, is entitled to expect a higher level of devotion to service. Norwalk Teachers' Assn. v. Board of Education (1951), 138 Conn. 269, 83 Atl. 2d 482. Another rationale is that the peculiar nature of the government, as opposed to private employers, makes it particularly vulnerable to the strike.

". . . In the private sector, union demands are usually checked by the forces of competition and other market pressures. Negotiators are typically limited by such restraints as the entry of non union competitors, the impact of foreign goods, the substitution of capital for higher-priced labor, the shift of operations to lower-cost areas, the contracting out of high-cost operations to other enterprises, the shutdown of unprofitable plants and operations, the redesign of products to meet higher costs, and finally the managerial option to go out of business entirely. Similar limitations are either nonexistent or very much weaker in the public sector. While budgets and corresponding tax levies operate in a general way to check increases in compensation, the connection is remote and scarcely applicable to particular units of groups of strategically located public employees. Unhampered by such market restraints, a union that can exert heavy pressure through a strike may be able to obtain excessive

wages and benefits." Cox and Bok, Labor Law (7th ed), pages 970, 971.

An additional rationale is that public employees have adequate opportunity to achieve their aims through the legislative process. Note: The Strike and Its Alternatives in Public Employment, 1966 Wisconsin Law Review, 549, 556. It is also often stated that the strike ban protects the public health, safety and welfare.

The position of the appellants is that neither these nor any other rationales can support the validity of the strike ban, at least with respect to them. They concede, of course, that a strike by police or firemen may result in real, immediate and irreparable harm to the community, and thus admit that the strike ban is valid as applied to those types of emergency services. They argue, however, that the statute is too broad in its scope.

Many courts have considered this issue and none have found a denial of equal protection. See: Annot. (1971), Labor Law: Right of Public Employees to Strike or Engage in Work Stoppage, 37 A.L.R. 3d 1147. As stated in United Federation of Postal Clerks v. Blount, supra, page 883:

"Given the fact that there is no constitutional right to strike, it is not irrational or arbitrary for the Government to condition employment on a promise not to withhold labor collectively, and to prohibit strikes by those in public employment, whether because of the prerogatives of the sovereign, some sense of higher obligation associated with public service, to assure the continuing functioning of the Government without interruption, to protect public health and safety or for other reasons. Although plaintiff argues that the provisions in question are unconstitutionally broad in covering all Government employees regardless of the type

or importance of the work they do, we hold that it makes no difference whether the jobs performed by certain public employees are regarded as 'essential' or 'non-essential,' or whether similar jobs are performed by workers in private industry who do have the right to strike protected by statute. . . . The Equal Protection Clause, however, does not forbid all discrimination. Where fundamental rights are not involved, a particular classification does not violate the Equal Protection Clause if it is not 'arbitrary' or 'irrational,' i.e., 'if any state of facts reasonably may be conceived to justify it.' McGowan v. Maryland, 366 U.S. 420, 426, 81 S. Ct. 1101, 1105, 6 L. Ed. 2d 393 (1961). . . ."

We conclude there is a meaningful distinction between governmental employees and nongovernmental employees. The strike ban imposed on public employees is based upon a valid classification and the legislation creating it is not unconstitutional as a denial of equal protection. If the no-strike ban legislatively imposed on public employees is to be abolished or altered, it must be done by the legislature and not the courts.

The teachers contend they were denied due process of law because the hearings were not considered and their discharges ordered by an impartial decisionmaker.

The Fourteenth Amendment to the United States Constitution provides, inter alia, that no state shall deprive any persons of property or liberty without due process of law. Before it can be determined whether the appellants were denied due process, it must be established that they were entitled to due process of law in that they were deprived of their property or liberty by state action.

State action is clearly present in this case. The Hortonville Joint School District No. 1 is organized under the laws of

the state of Wisconsin and is a municipal employer as defined in sec. 111.70, Stats. The school board is charged under chs. 118 and 120 with the management of the school district. The district, the board and their agents are therefore extensions of the state.

With respect to the question of deprivation of property, we refer to Board of Regents v. Roth (1972), 408 U.S. 564, 92 Sup. Ct. 2701, 33 L. Ed. 2d 548, and Perry v. Sindermann (1972), 408 U.S. 593, 92 Sup. Ct. 2694, 33 L. Ed. 2d 570. In Roth, the court decided that a nontenured assistant professor was not entitled to procedural due process when his one-year teaching contract was not renewed. The court stated:

"The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests — property interests — may take many forms.

". . .

". . . To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely on their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

"Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. . . ." Roth, supra, pages 576, 577.

In Perry, the court added:

"A written contract with an explicit tenure provision clearly is evidence of a formal understanding that supports a teacher's claim of entitlement to continued employment unless sufficient 'cause' is shown. Yet absence of such an explicit contractual provision may not always foreclose the possibility that a teacher has a 'property' interest in reemployment. For example, the law of contracts in most, if not all, jurisdictions long has employed a process by which agreements, though not formalized in writing, may be 'implied.' 3 A. Corbin on Contracts, secs. 561-572A (1960). Explicit contractual provisions may be supplemented by other agreements implied from 'the promisor's words and conduct in the light of the surrounding circumstances.' Id., at sec. 562. And, '[t]he meaning of [the promisor's] words and acts is found by relating them to the usage of the past.' Ibid." Perry, supra, pages 601, 602. See also Pelisek v. Trevor State Graded School Dist. No. 7 (E.D. Wis. 1974), 371 Fed. Supp. 1064.

In Wieman v. Updegraff (1952), 344 U.S. 183, 73 Sup. Ct. 215, 97 L. Ed. 216, the court held that professors removed from office during the terms of their contracts were entitled to due process. See also, Carpenter v. City of Greenfield School District No. 6 (E.D. Wis. 1973), 358 Fed. Supp. 220.

In this case the appellant-teachers were discharged during the terms of their 1973-1974 contracts and their offers or contracts for employment for the 1974-1975 school year were revoked or rescinded. This unquestionably amounted

to a deprivation of property within the intendment of the due process clause.

The respondents contend that no deprivation of property is involved because the employees, by going on strike, abandoned whatever property interest they had in continued employment. Going on strike, the respondents argue, is the equivalent of quitting, a unilateral breach of the employment contract which dissolves any property interests for due process purposes.

It is unnecessary to reach the merits of this contention, however, because the argument begs the question. One of the purposes of due process in this context is to determine whether the alleged conduct did in fact take place. To say that the performance of certain acts forecloses the requirement of a hearing to determine whether the acts were in fact performed is to engage in circular reasoning. The teachers were deprived of a constitutional property right in this case.

Another question to be considered is whether the teachers were deprived of liberty. The United States Supreme Court in Roth, supra, pages 573, 574, stated:

"There might be cases in which a State refused to re-employ a person under such circumstances that interests in liberty would be implicated. But this is not such a case.

"The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For '[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.' Wisconsin v.

Constantineau, 400 U.S. 433, 437. Wieman v. Updegraff, 344 U.S. 183, 191. . . . In such a case, due process would accord an opportunity to refute the charge before University officials. In the present case, however, there is no suggestion whatever that the respondent's 'good name, reputation, honor, or integrity' is at stake.

"Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The State, for example, did not invoke any regulations to bar the respondent from all other public employment in state universities. Had it done so, this, again, would be a different case. For '[t]o be deprived not only of present government employment but of future opportunity for it certainly is no small injury. . . .' Joint Anti-Fascist Refugee Committee v. McGrath [341 U.S. 123] . . . at 185 (Jackson, J., concurring). . . ."

In Roth, there was no stated reason for the nontenured teacher not being rehired. In the case at bar, however, the stated reasons were two: (1) The teachers had breached their contracts, and (2) they had engaged in a strike contrary to Wisconsin law. It is apparent that such charges could detrimentally affect an individual's reputation in the labor market and thereby significantly undermine his opportunities for re-employment. Due process requires a notice and hearing and an opportunity for the teachers to clear themselves of such charges.

Having determined that the teachers were entitled to due process, the more difficult question of what process is due emerges. The often-quoted Cafeteria & Restaurant Workers Union v. McElroy (1961), 367 U.S. 886, 895, 81 Sup. Ct. 1743, 6 L. Ed. 2d 1230, provides:

". . . consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."

Thus a balancing test must be established to weigh the interest of the school district in summary determination against the interests of the teachers in their continued employment. Only in light of that balancing test can it be determined whether the procedures afforded the teachers failed to satisfy the constitutional requirements of due process.

With respect to those procedures, the appellants allege their constitutional inadequacy in only one respect, i.e., the lack of an impartial decisionmaker.[7] The requirement of an impartial decisionmaker is well established as an essential component of procedural due process. See Gibson v. Berryhill (1973), 411 U.S. 564, 578, 93 Sup. Ct. 1689, 36 L. Ed. 2d 488; Ward v. Village of Monroeville (1972), 409 U.S. 57, 60, 93 Sup. Ct. 80, 34 L. Ed. 2d 267; Morissey v. Brewer (1972), 408 U.S. 471, 92 Sup. Ct. 2593, 33 L. Ed. 2d 484; Goldberg v. Kelly (1970), 397 U.S. 254, 271, 90 Sup. Ct. 1011, 25 L. Ed. 2d 287. In Morrissey, involving

[7]The appellants do make brief reference to the alleged lack of timely notice, the failure of the board to present evidence against them, and the preclusion of the teachers from questioning members of the board or offering affirmative evidence. They do not argue these points, however, and the only issue raised regarding due process goes to the alleged lack of an impartial decisionmaker.

With respect to the lack of timely notice, it should be noted that although the longest notice received was four days, spanning a weekend, and the shortest was received on the day of the hearing; counsel for the teachers was asked at the hearing how much additional time he needed to prepare. Counsel replied that he would make an offer of proof and then let the board know if he needed more time. The offer was made but counsel never requested additional time thereafter.

the due process required to be afforded a parolee prior to revocation, the court stated:

"In our view, due process requires that after the arrest, the determination that reasonable ground exists for revocation of parole should be made by someone not directly involved in the case. It would be unfair to assume that the supervising parole officer does not conduct an interview with the parolee to confront him with the reasons for revocation before he recommends an arrest. It would also be unfair to assume that the parole officer bears hostility against the parolee that destroys his neutrality; realistically the failure of the parolee is in a sense a failure for his supervising officer. However, we need make no assumptions one way or the other to conclude that there should be an uninvolved person to make this preliminary evaluation of the basis for believing the conditions of parole have been violated. The officer directly involved in making recommendations cannot always have complete objectivity in evaluating them. Goldberg v. Kelly found it unnecessary to impugn the motives of the case worker to find a need for an independent decisionmaker to examine the initial decision." Morrissey, supra, pages 485, 486.

In Ward, supra, a case involving a situation where a city mayor was empowered to sit as judge to try ordinance violation cases, the fines from which constituted a significant part of the city's income, the court stated that the test was whether:

". . . [the] situation is one 'which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused. . . .' . . . ." Ward, supra, page 60.

It is important to note that procedural due process is not limited to the factual determination as to whether an individual did or did not engage in the particular conduct. It extends as well to the action taken by the state once that conduct is established. As stated in Morrissey, supra, page 488:

"This [due process] hearing must be the basis for more than determining probable cause; it must lead to a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation. The parolee must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that violation does not warrant revocation."

Therefore it would seem essential, even in cases of undisputed or stipulated facts, that an impartial decisionmaker be charged with the responsibility of determining what action shall be taken on the basis of those facts. "The principle of fair play is an important factor in a consideration of due process of law." General Electric Co. v. Wisconsin Employment Relations Board (1958), 3 Wis. 2d 227, 241, 88 N.W. 2d 691; Durkin v. Board of Police & Fire Comm. (1970), 48 Wis. 112, 122, 180 N.W. 2d 1.

The background giving rise to the ultimate facts in this case reveals a situation not at all conducive to detachment and impartiality on the part of the school board. The board was the collective bargaining agent for the school district and thus was engaged in the collective bargaining process with the teachers' representative, the HEA. It is not difficult to imagine the frustration on the part of the board members when negotiations broke down, agreement could not be reached and the employees resorted to concerted activity.

This is not to suggest, of course, that the board members were anything but dedicated public servants, trying to provide the district with quality education while still keeping within its limited budget. They were, however, not uninvolved in the events which precipitated decisions they were required to make. The decision to discharge was possibly a convenient alternative which would eliminate their labor problems in one fell swoop. We conclude that the board was not an impartial decisionmaker in a constitutional sense and that the appellants were denied due process of law.

Respondents rely heavily on two cases, Arnett v. Kennedy (1974), 416 U.S. 134, 94 Sup. Ct. 1633, 40 L. Ed. 2d 15, and Johnson v. Board of Regents (W.D. Wis. 1974), 377 Fed. Supp. 227, to support their contention that there is no due process violation involved in this case. In Arnett, a federal employee was discharged by his immediate superior because the employee allegedly made disparaging remarks about such superior. The court held that whatever expectancy of continued employment, and hence property right, the employee had in his job was created by the Lloyd-La Follette Act (Act of Aug. 24, 1912, c. 389, sec. 6, 37 Stat. 555, now 5 U.S.C., sec. 7501), which provides in pertinent part at page 150:

" '[N]o person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing, and the person whose removal is sought shall have notice of the same and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; but no examination of witnesses nor any trial or hearing shall be

required except in the discretion of the officer making the removal; . . .' "

The three justices who constituted the plurality in Arnett stated with respect to due process:

". . . the very section of the statute which granted him that right, a right which had previously existed only by virtue of administrative regulation, expressly provided also for the procedure by which 'cause' was to be determined, and expressly omitted the procedural guarantees which appellee insists are mandated by the Constitution. Only by bifurcating the very sentence of the Act of Congress which conferred upon appellee the right not to be removed save for cause could it be said that he had an expectancy of that substantive right without the procedural limitations which Congress attached to it. . . ." Arnett, supra, page 152.

The plurality thus concluded that extent of the property right was limited by the act itself, and hence due process was not required. There is no analogous situation here.

In Johnson, the chancellors of the various campuses in the state university system were faced with budget cuts, and thus had to determine how to effectuate them. The plaintiff-professor was discharged by his chancellor as a result of such situation. With respect to the plaintiff's claim that the chancellor was an impartial decisionmaker, the court stated at page 240:

"The initial decision obviously had too be made by someone and the chancellor was a wholly appropriate choice." There is nothing in that case, however, to suggest a potential for bias or impartiality as in the case at bar and thus it is inopposite.

The respondents and amici curiae argue that the existence of postdetermination review procedures ameliorate any impartiality in the original determination. An analysis of the two procedures suggested, however, reveals their inadequacy. The first is the common-law writ of certiorari. The scope of review by certiorari is limited to determining:

". . . '. . . (1) Whether the board kept within its jurisdiction; (2) whether it proceeded on correct theory of law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question.' " State ex rel. Ball v. McPhee (1959), 6 Wis. 2d 190, 199, 94 N.W. 2d 711. See also State v. Goulette (1974), 65 Wis. 2d 207, 222 N.W. 2d 622.

The second suggested procedure — review by the Wisconsin Employment Relations Commission under sec. 111.70 (4), Stats. Such procedure applies only in the case of employee prohibited practices, however. Neither of these alternatives provide for review to determine whether another course of action such as mediation, injunction, continued collective bargaining or arbitration would have been a more reasonable response on the part of the decisionmaker. In light of that fact, it is difficult to see how either review by common-law certiorari or by the WERC[8] can replace an impartial decisionmaker in the first instance.

When the teachers went on strike, the school board was undoubtedly faced with a situation that needed immediate attention. Clearly, it had a duty to keep the schools open and staff them with competent teachers. If the schools were closed so that the statutory minimum number of school days

[8]But *see: Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B., supra.*

was not reached, monetary state school aid would have been denied or jeopardized leading to a severe budget crisis. True, it could have sought an injunction or gone to the WERC for some relief, but neither the courts nor the WERC could hire or fire teachers. Sec. 118.22 (2), Stats., provides in part: "No teacher may be employed or dismissed except by a majority vote of the full membership of the board."

Assuming the school board did recognize, under this factual background, that it was not an impartial decisionmaker or hearing officer as constitutionally contemplated, where was it to go to obtain an authorized impartial hearing officer or decisionmaker? The answer is that the law as it presently exists does not provide for one. Legislation could establish a necessary forum and procedures directly or by delegation to a proper department of government, but it does not.

When an adequate remedy or forum does not exist to resolve disputes or provide due process, the courts, under the Wisconsin Constitution,[9] can fashion an adequate remedy.

The plaintiffs-appellants contend that part of sec. 118.22 (2), Stats., which gives the school the exclusive right to hire and fire, is unconstitutional in that it denies due process. If the statute can be construed or procedures provided to meet a valid constitutional objection, it should be done.

We believe the school board should make the initial determination as to the hiring or firing of one or many teachers.

[9]Sec. 9, art. I, Wis. Constitution, states: "Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws." *See also: State ex rel. Wickham v. Nygaard* (1915), 159 Wis. 396, 150 N. W. 513; *Wisconsin Telephone Co. v. Public Service Comm.* (1939), 232 Wis. 274, 287 N. W. 122, 287 N. W. 593; *Huebner v. State* (1967), 33 Wis. 2d 505, 147 N. W. 2d 646.

In those situations where due process is required, namely where the employed teacher's property right or liberty is at stake — notice, a hearing and a statement of reasons should be given. As much control as possible should be left with the school board to set policy and manage the school.

In those situations where an employed teacher is discharged or otherwise disciplined and due process is required, and the school board is in an adversary position, we hereby provide and direct that the dissatisfied teacher or teachers can, upon petition, obtain a de novo determination of all issues in any court of record in the county where the school district or a part of it is located. The issues shall be determined by the court without a jury, unless the judge determines to call a jury and receive an advisory verdict. The court shall resolve any factual disputes and provide for a reasonable disposition.

The trial of the contested issues shall be given a trial date preference consistent with the reasonable administration of the court's calendar.

This method of disposition is not ideal because a court may be required to make public policy decisions that are better left to a legislative or administrative body. However, because of fundamental constitutional protection is involved and no adequate forum exists, we fashion this remedy. It will be available to teachers[10] until such time and only until such time as the legislature provides a means to establish a forum that will meet the requirements of due process.

This procedure just announced requires that we reverse the trial court's summary judgment and that the matter be remanded to the trial court with the right of the parties to

[10]This remedy is limited to public school teachers because we deal here with a specific school teacher statute, sc. 118.22 (2).

amend their pleadings so as to bring the necessary issues before the trial court.

The appellants also assert that the action of the board of education, wherein it decided to discharge the striking teachers, was in violation of the open meeting law.

This issue was raised in the appellants' third cause of action in the amended complaint filed in the trial court.

Paragraph 15 of the amended complaint provides:

"On April 2, 1974, the Board, its administrators and agents, met and held a special meeting at which they considered, decided and acted to terminate the employments of the plaintiffs and other teachers similarly situated. No notice of said special meeting was ever given to the plaintiffs, or any other teachers similarly situated nor to the public."

The open meeting law, sec. 66.77, Stats., provided in part, prior to June 15, 1974:

"(2) To implement and insure the public policy herein expressed, all meetings of all state and local governing and administrative bodies, boards, commissions, committees and agencies, including municipal and quasi-municipal corporations, unless otherwise expressly provided by law, shall be publicly held and open to all citizens at all times, except as hereinafter provided. No formal action of any kind, except as provided in sub. (3), shall be introduced, deliberated upon or adopted at any closed session or closed meeting of any such body, or at any reconvened open session during the same calendar day following a closed session. No adjournment of a public meeting into a closed session shall be made without public announcement of the general nature of the business to be considered at such closed session, and no other business shall be taken up at each closed session.

"(3) Nothing herein contained shall prevent executive or closed sessions for the purposes of:

"(a) Deliberating after judicial or quasi-judicial trial or hearing;

"(b) Considering employment, dismissal, promotion, demotion, compensation, licensing or discipline of any public employe or person licensed by a state board or commission or the investigation of charges against such person, unless an open meeting is requested by the employe or person charged, investigated or otherwise under discussion."

The trial court sustained a demurrer to the third cause of action of the complaint, concluding that the meeting of the board fell within exceptions (3) (a) and (b) of the statute. With respect to (3) (b), the court noted that the complaint failed to allege that any employee had requested an open meeting.

The appellants' argument centers around the failure of the board to give any notice of the meeting. They contend that exception (3) (a) does not apply because deliberations after a "judicial or quasi-judicial trial or hearing" necessarily amounts to an "adjournment of a public meeting into a closed session," and therefore requires a public announcement or notice. No authority is cited for that proposition and we believe the language of the statute permits no such interpretation.

With respect to sub. (3) (b), the appellants contend that they are foreclosed from requesting an open meeting because notice that the meeting was to be held was never given. First, it must be noted that the statute (prior to June 15, 1974) did not require that notice be given. More importantly, however, paragraph 5 of the amended complaint,

which is specifically incorporated by reference into the third cause of action, clearly states that the board "notified the employees that the Board was considering taking action against their then current teaching contracts." In light of such allegation, which is borne out by other parts of the record, the appellants' contention that they had no opportunity to request an open meeting is without foundation. We conclude the demurrer to the third cause of action was properly sustained.

By the Court. — Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion. Order affirmed. No costs to be taxed.

STATE OF WISCONSIN
IN SUPREME COURT

August Term, 1974 No.635

HORTONVILLE EDUCATION ASSN. et al.,
Appellants,

v.

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1, et al.,
Respondents.

HANLEY, J. (Concurring in part; dissenting in part).

I concur with the majority's conclusion that the demurrer to the third cause of action relating to the alleged violation of the open meeting law was properly sustained.

I respectfully dissent to the majority's ruling reversing the trial court's granting of summary judgment on the first cause of action.

Sec. 111.70 (4) (l), Stats., provides as follows:

"Strikes prohibited. Nothing contained in this subchapter shall constitute a grant of the right to strike by any county or municipal employe and such strikes are hereby expressly prohibited."

The above provision means exactly what it states. Therefore, the action of the teachers, acting in concert, in refusing to report for work cannot be sanctioned as a strike either by this court, the school district, the teachers' union or the teachers. The action of the teachers constitutes a unilateral breach of employment.

On April 2, 1974 the board held a special meeting at which it adopted a resolution terminating the employment of the teachers who refused to report for work. Such action was an acceptance of the breach of contract by the teachers. With that acceptance, all employment relations between the board and the teachers terminated. Upon that termination any action on the part of the board relative to discharge was superfluous. There is no issue to be tried.

I would affirm the judgment.

I am authorized to state that Mr. Justice CONNOR HANSEN joins in this concurrence-dissent.

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Respondents.

ROBERT W. HANSEN, J. (concurring). School boards in this state are directed by statute to contract for the serv-

ices of qualified teachers in their schools.[1] School teachers in this state are employees of such school boards and stand "in a contract relation."[2] Except as otherwise provided by statute,[3] or constitutionally required,[4] the entire relationship between a school board and a school teacher derives from the contract between them.[5]

[1]Sec. 118.21 (1), Stats., provided: "The school board shall contract in writing with qualified teachers. . . ."

[2]*State ex rel. O'Neil v. Blied* (1925), 188 Wis. 442, 446, 206 N. W. 213, holding: "One engaged in teaching in this state and whose services are to be paid for in whole or in part by the state school fund . . . stands in a contract relation. . . ."

[3]*See: Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B.* (1967), 35 Wis. 2d 540, 557, 151 N. W. 2d 617, holding sec. 111.70 (3) (a), Stats., to prohibit municipal employers, including school districts, from " '1. Interfering with, restraining or coercing any municipal employe in the exercise of the rights provided in sub. 2.

" '(2) Encouraging or discouraging membership in any labor organization, employe agency, committee, association or representation plan by discrimination in regard to hiring, tenure or other terms or conditions of employment.' "

See also: Sec. 119.42, Stats., establishing teacher tenure or permanent appointment after three years of continuous teaching service, but applying only to cities of the first class. As to status under tenure law, *see: State ex rel. Thompson v. School Directors* (1923), 179 Wis. 284, 288, 191 N.W. 746, citing *State ex rel. Murphy v. Board of Trustees* (1918), 168 Wis. 238, 169 N. W. 567.

[4]*See: Alston v. School Board of City of Norwalk* (4th Cir. 1940), 112 Fed. 2d 992, holding that the right of a negro teacher to declaratory or injunctive relief against the practice of a school board in fixing salaries for negro teachers at a lower scale than for white teachers is not waived, or otherwise precluded, by the fact that the negro teacher has entered into a contract with the school board for the current year to perform teaching services. (Certiorari denied in 311 U.S. 693, 61 Sup. Ct. 75, 85 L. Ed. 448.)

[5]*Board of Education of South Milwaukee v. State ex rel. Reed* (1898), 100 Wis. 455, 462, 76 N. W. 351, holding: ". . . the relations and obligations between the relator . . . and the high school board of said district were purely and strictly of a contractual character. . . ."

The school board in Hortonville had entered into such contractual relationship with each of its school teacher employees for the school year, 1973-74. Each such personal service contract fixed the salary, determined the services to be performed and set the term or period of employment. Each such contract incorporated into it "the last collective bargaining agreement," the 1972-73 master contract, between the Hortonville school board and the Hortonville education association.[6] When the Hortonville teachers went on strike, they were teaching under contract, not after their contracts had expired.[7] When they failed to appear at the school to perform their duties under the contract, it became the duty of the school board to conduct an "inquiry into the question of the failure of a teacher to perform his contract obligation" and in case of such breach "to take such steps as may be necessary to carry out the purposes of the school."[8]

[6]"It is Further Agreed, that this contract incorporates herein by reference, to have the same effect as if made a part thereof of the last collective bargaining agreement entered into by and between the Hortonville Education Association, and said School Board, dated May 8, 1972, and is subject to all terms and conditions of such collective bargaining agreement. . . ." (Individual contract, March 12, 1973.)

[7]As to "minimal procedural safeguards" of sec. 118.22, Stats., applying to teachers not rehired, *see: Richards v. Board of Education* (1973), 58 Wis. 2d 444, 458, 206 N. W. 2d 597.

[8]*Curkeet v. Joint School District* (1914), 159 Wis. 149, 152, 149 N. W. 708, this court holding: ". . . School boards have thereby [sec. 441, Stats. 1913] enjoined upon them very extensive duties in maintaining the common schools and in administering the school affairs. Such duties embrace that of inquiry into the question of the failure of a teacher to perform his contract obligation as a teacher, and if they find that a teacher has breached his contract it is their duty to take such steps as may be necessary to carry out the purposes of the school, and if a teacher has failed to perform his duties under his contract they can discharge him from further service. . . ."

Facing such duty to ". . . take such steps as may be necessary" to reopen the school, the Hortonville school board acted. It did not go to court (as appellants now claim it should have) to seek an injunction, not only declaring the strike illegal[9] but also ordering the teachers back to the classroom under the contract. It could have chosen this route, but was not required so to elect. Neither did the school board prefer charges of misconduct against the teachers, seeking their "discharge for cause" under the contract.[10] It could have taken this approach, but it is clear that it did not bring charges of misconduct under the contract. Instead, what the Hortonville school board did was to rescind or terminate the personal service contracts as to all teachers who elected to remain on strike. (The dissenting-in-part opinion terms this ". . . an acceptance of the breach of contract by the teachers," which is another way of saying the same thing.)

The communication sent each teacher by the board stated that the board had been informed by its superintendent of schools that, "You have breached your individual employment contract; You have engaged in an unlawful

[9]*See:* Sec. 111.70 (4) (1), Stats. (upheld as constitutionally valid, applied to teachers, by majority opinion here), provides: "*Strikes prohibited.* Nothing contained in this subchapter shall constitute a grant of the right to strike by any county or municipal employe and such strikes are hereby expressly prohibited."

[10]*Scott v. Joint School District* (1881), 51 Wis. 554, 557, 8 N. W. 398, this court holding: ". . . We think the school board . . . have the power to close the school and discharge the teacher for just cause. . . ." As to scope of judicial review of such discharge for just cause, *see: Clark v. Blochowiak* (1942), 241 Wis. 236, 239, 5 N. W. 2d, 772, holding, where board of vocational education discharged for cause a supervisor of its dental clinic after a hearing, that, on certiorari to review the action taken by the board, ". . . the only matter the court could properly consider was whether on the evidence properly received by the board the charges against the plaintiff were sustained."

strike contrary to Wisconsin law."[11] The communication set a time and place for hearings as to whether the individual teacher had breached the employment contract, and noted that possible board action, if the facts established such breach, included ". . . termination of your employment contract."[12] A subsequent resolution, adopted by the school board, terminated the employment relationship as to teachers who had been thus notified or who had waived notice of their ". . . alleged breach of employment contract and participation in an unlawful strike."[13] To the writer it appears clear that the school board, by thus terminating the employer and employee relationship on the ground of a major breach of such contract by the striking teachers, was rescinding the contracts of personal service as to all teachers who did not return to their teaching assignments.

A contract, including a personal service contract,[14] remains in force in accordance with its terms, unless one party to it ". . . acts inconsistently with the duty imposed upon him by the contract, which amounts to an abandonment. . . ."[15] However, it is not every breach of a contract consisting of failure to perform exactly that entitles the other party to rescission. Our court has held that, before a party not in default may be entitled to relief of rescission,

[11]Letter from Roger Weihing, President, for the Board of Education to individual teachers, March 29, 1974.

[12]*Id.*

[13]Resolution, Adopted by the Board of Education, April 2, 1974.

[14]68 Am. Jur. 2d, *Schools,* sec. 143, page 475, stating: "The principles governing contracts generally are applicable to contracts for the employment of teachers. Thus, such a contract is considered one for personal services and, where entered into for a definite term, is an entire contract for the period covered."

[15]17 Am. Jur. 2d, *Contracts,* sec. 482, page 951.

there must be "so serious a breach of the contract by the other party as to destroy the essential objects of the contract."[16] Or, as another court has phrased it, the failure of performance, in order to constitute a ground for rescission, must be total, "such as to defeat the object of the contract or render it unattainable."[17] The claim of right to terminate and rescind its contracts with its teachers on ground of breach of contract was properly assertable by the Hortonville school board. But the determination of whether the claimed breach of contract constituted ground for such rescission was here for a court to decide.

With the school board action found to be a rescission of contract, based on claim of teacher breach of contract, it follows that either party to the contract had right of recourse to the courts for a judicial determination of whether the breach warranted the rescission.[18] With the multiple cancellations of personal service contracts involved in an area of vital public concern, in the case before us the legal remedy is obviously inadequate, and the aid of a court of equity is required.[19] It follows that the school board here might have

[16]*Hoffman v. Danielson* (1947), 251 Wis. 34, 38, 27 N. W. 2d 759, this court holding: ". . . Before a party not in default may be entitled to the relief of rescission, there must be so serious a breach of the contract by the other party as to destroy the essential objects of the contract. . . ."

[17]*Ellison, Son & Co. v. Flat Top Grocery Co.* (1911), 69 W. Va. 380, 387, 71 S.E. 391, stating the rule to be: " 'Generally the failure of performance, in order to constitute a ground for rescission, must be total; such as to defeat the object of the contract or render it unattainable. . . .' " Quoting 24 Am. & Eng. Ency. L 644.

[18]17 Am. Jur. 2d, *Contracts*, sec. 503, page 979, stating: "Although contracts do not terminate as a matter of course on a breach, they may be terminable therefor. . . ."

[19]*See:* 17 Am. Jur. 2d, *Contracts*, sec. 485, page 955.

sought by application to a court of equity a judicial affirmation of its action in rescinding the employment contracts on ground of serious breach of contract by the teachers. Certainly the teachers, all or any one of them, are also entitled to challenge in a court of equity the action taken by the board. In either event, the issue for the court to determine is whether the breach of their contracts by the teachers under the circumstances,[20] was such as to warrant the school board's action in terminating their employment and rescinding their contracts. The test is the Hoffman Case test.[21] In the posture of this case, the teachers have instituted equity proceedings, but not for the purpose above set forth. However, with an opportunity to amend such petition or pleadings granted, the proceedings instituted can be amended to present this issue and permit a judicial determination as to whether the teacher conduct, under the circumstances, justified the school board action.

Also on appeal to this court is the challenge to an order of the county court of Outagamie county, the Honorable R. Thomas Cane, presiding, which included orders that the school board submit a list of discharged teachers whom the board "would offer positions back" for the balance of the 1973-74 school year, that the board offer striking teachers positions for the balance of the 1973-74 school ". . . if and

[20]17 Am. Jur. 2d, *Contracts*, sec. 501, page 977, stating: "No hard and fast rule exists as to the right of rescission for cause; the right usually depends on the circumstances of the particular case. . . ." *See also:* 17 Am. Jur. 2d, *Contracts*, sec. 503, page 980, stating: ". . . Moreover a party seeking to rescind must show that he was free from default in relation to the obligation which he claims the other party failed to perform. . . ." *See also:* As to violations of contract held not to justify rescission: *E. L. Ilusting Co. v. Coca Cola Co.* (1931), 205 Wis. 356, 237 N. W. 85, 238 N. W. 626.

[21]*Hoffmann v. Danielson, supra*, footnote 16.

when vacancies arose," and that striking teachers offered a vacancy for the remainder of the 1973-74 school year accept such offer. The basic issue on appeal appears to be the jurisdiction of the county court, sitting in equity, to issue the order. The board initiated the proceedings involved, seeking a court order limiting picketing activity. Without comment on the issues raised on such appeal, pro or con, the writer considers it unfortunate that such appeal (No. 133, August Term, 1974) was not consolidated with the appeal here, so that all aspects of judicial proceedings involving the Hortonville teachers' strike could have, at one time and in one opinion, been considered and determined.

On this appeal, however, applying the law to the facts, the writer would: (1) Concur in the majority holding that the no strike by county or municipal employees' statute, sec. 111.70 (4) (1), Stats., is constitutionally valid; (2) concur in the majority holding that the open meeting law was not here violated; and (3) concur in the majority holding for reversal and remand but would limit the scope and purpose of such remand, with appellants here granted leave to amend their petition within thirty days, the petition to be amended to raise and present for judicial determination the issue of whether the acts of the teachers, under these circumstances, justified the school board in rescinding the employment contracts and terminating employment.

(JUDGMENT OF WISCONSIN SUPREME COURT)

And afterwards, to-wit on the 5th day of February, A.D., 1975, the same being the 54th day of said term, the judgment of this Court was rendered in words and figures following, that is to say:

Hortonville Education Association and Michael Wisnoski, Rose Marie Olson, Thomas Nadeau, Judy Murphy, Russel Lichte and Ronald Hammond,

Appellants,

v.

Hortonville Joint School District No. 1; Board of Education of Hortonville Joint School District No. 1; Roger Weihing, Robert Hauk, Jean Meads, Floyd Meyer, Merlin Plamann, Victor Schroth and Ronald Surprise, individually and as officers and members of the Board of Education of Hortonville Joint School District No. 1; and Marvin Obry, Robert Kohls and Gene Riedl, individually and as administrators of Hortonville Joint School District No. 1,

Respondents.

This cause came on to be heard on appeal from the judgment of the Circuit Court for Outagamie County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court for Outgamie County herein, be, and the same is hereby reversed and cause remanded for further proceedings not inconsistent with this opinion. Order affirmed.

Opinion by Justice Beilfuss.

(Justices Hanley and C .T. Hansen concur in part; dissent in part. Memo filed. Justice R. W. Hansen concurs. Memo filed.)

STATE OF WISCONSIN
IN SUPREME COURT

August Term, 1974 Case No. 635

[Caption omitted in printing]

MOTION FOR REHEARING

The Respondents named above, by their attorneys, Melli, Shiels, Walker & Pease, S.C., hereby move this Court for rehearing in the captioned matter. The decision herein was filed February 5, 1975.

February 21, 1975.

MELLI, SHIELS, WALKER & PEASE, S.C.
By /s/ JAMES K. RUHLY

STATE OF WISCONSIN
IN SUPREME COURT

August Term, 1974 Case No. 635

[Caption omitted in printing]

MOTION FOR REHEARING

The appellants by their attorneys SAMSON, FRIEBERT, FINERTY & BURNS by Robert H. Friebert, hereby move the Court for a rehearing in the above captionel case.

Dated this 22nd day of February, 1975.

SAMSON, FRIEBERT, FINERTY & BURNS
By /s/ ROBERT H. FRIEBERT

STATE OF WISCONSIN
IN SUPREME COURT

August Term, 1974 Case No. 635

[Caption omitted in printing]

PETITION FOR ORDER TO SHOW CAUSE
AND TEMPORARY RESTRAINING ORDER

The appellants by their attorney ROBERT H. FRIEBERT, hereby petition the Court for a temporary restraining order and order to show cause with respect to the above captioned case and in support of said petition represent and show to the Court as follows:

1. On February 5, 1975 this Court issued an opinion in the above captioned case holding that the respondent School Board was a constitutionally defective body to determine the facts of an alleged strike and was a constitutionally defective body for purposes of imposing a penalty, if any, upon persons ultimately found to have engaged in striking. The case was reversed and ordered remanded to the Circuit Court of Outagamie County for a de novo hearing on the merits of all aspects of this labor dispute, with the Circuit Court of Outagamie County directed to independently determine the facts and the appropriate action to be taken, if any, under all of the circumstances of the controversy.

2. This case is presently pending in the Wisconsin Supreme Court in that 20 days have not elapsed from the filing of this opinion and, therefore, this Court has sole jurisdiction in the premises.

3. Commencing on or about February 12, 1975, the respondent School Board issued notices that the Board was

considering dismissal of the individual appellants by non-renewal of teaching contracts which they may have. A copy of a sample letter of notification is attached hereto as Exhibit "A".

4. The only basis which the School Board could possibly have for attempting to now dismiss the individual appellants is their conclusion that the appellants were striking and that the penalty to be imposed for striking is dismissal. The respondents are therefore attempting to destroy the rights of the appellants by this subterfuge.

5. Hearings are scheduled to commence on Tuesday, February 25, 1975. Oral notification of the commencement of these hearings was given on February 19, 1975.

6. The respondent School Board is without jurisdiction to do anything whatsoever with respect to the allegations of striking since those issues are the subject matter of this appeal and exclusive jurisdiction in the premises is at this time in the Wisconsin Supreme Court and, upon remittitur, exclusive jurisdiction will be in the Circuit Court of Outagamie County.

7. The 1972-1973 "master contract" was extended by the Board in March of 1974. That contract compels the Board to state reasons for dismissal by non-renewal of a contract. (Page 8 of "master contract"). Furthermore, no teacher can be dismissed unless the dismissal is "for just cause". (Page 1 of "master contract", Management Rights, ¶2). A copy of the "master contract" is attached hereto as Exhibit "B".

8. Thus, your appellants are being threatened with a continuation of their loss of property and liberty without

being provided due process of law as compelled by the opinion of the Court. The action taken by the respondents, if not restrained, would interfere with the jurisdiction of this Court, cause irreparable injury to the appellants and would circumvent and destroy the decision of the Court dated February 5, 1975.

WHEREFORE, your appellants pray that this Court issue an order to show cause for a date certain compelling the respondents to show why they should not be permanently restrained and enjoined from proceeding with their proposed dismissal of the individual appellants as contained in Exhibit "A" and for a temporary restraining order until the matter is heard and decided preventing the respondents from taking any action whatsoever with respect to their proposed dismissal of the individual appellants as contained in Exhibit "A".

Dated at Milwaukee, Wisconsin this 20th day of February, 1975.

/s/ ROBERT H. FRIEBERT

[EXHIBIT A, Petition for Order to Show Cause and Temporary Restraining Order]

Whether you hold a teaching contract for the 1974-75 school year may be an issue subject to litigation.

Pursuant to Sec. 118.22, Wis. Stats., you are hereby advised that the Board of Education for the Hortonville Community Schools is considering nonrenewal of any teaching contract it may be determined you have.

Please be further advised that Sec. 118.22 (3), Stats., provides that you have the right to a private conference with

the Board prior to being given notice of refusal to renew any contract it may be determined you have. However, if you wish such a conference, you must file a request therefor with the Board within 5 days after your receipt of this preliminary notice.

FOR THE BOARD OF EDUCATION:
By /s/ Marvin Obry, Superintendent

[Exhibit B omitted, printed at page 42 of this Appendix]

STATE OF WISCONSIN
IN SUPREME COURT

August Term, 1974 Case No. 635

[Caption omitted in printing]

ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER

Upon the application of the appellants,

IT IS HEREBY ORDERED that the respondents show cause if any they have on the 24th day of February, 1975 at 11:00 o'clock in the forenoon as to why they should not be permanently restrained and enjoined from proceeding with their proposed dismissal of the individual appellants by non-renewal of their teaching contracts for the 1975-1976 school year as outlined in the petition of the appellants attached hereto and made a part hereof.

IT IS FURTHER ORDERED that the respondents are restrained and enjoined until further order of this Court from taking any actions whatsoever with respect to their proposed dismissal of the individual appellants by non-renewal of their teaching contracts for the 1975-1976 school

year as set forth in the petition attached hereto and made a part hereof.

IT IS FURTHER ORDERED that a copy of this order to show cause and temporary restraining order be served upon the counsel for the respondents no later than February 22, 1975.

/s/ HORACE W. WIEKI
Chief Justice, Wisconsin Supreme Court

STATE OF WISCONSIN
IN SUPREME COURT

August Term, 1974 Case No. 635

[Caption omitted in printing]

MOTION TO VACATE TEMPORARY RESTRAINING ORDER AND TO DENY PERMANENT INJUNCTION AND MEMORANDUM IN SUPPORT OF MOTION TO VACATE TEMPORARY RESTRAINING ORDER AND IN OPPOSITION TO ORDER TO SHOW CAUSE FOR PERMANENT INJUNCTION

Respondents, by Melli, Shiels, Walker & Pease, S.C., their attorneys, hereby move the Court to vacate the Temporary Restraining Order herein and to deny Appellant's petition for a permanent injunction for the following reasons.

1. Appellants are still on strike (see Respondent's supporting affidavit, and the Appellants' petition for leave to file an original action in this court). Since such strikes are unlawful, Appellants are not entitled to injunctive relief.

Judge Deehr so held (Ap. App. 144) such holding has never been appealed, and is the law of the case.

2. Even if Appellants were to terminate their strike and make an unconditional offer to return to work, Appellants unlawful strike caused the Board to respond to its duty to operate the schools by hiring its present staff of teachers. Therefore, equity requires Appellants not be given injunctive relief against a situation caused by their unlawful strike.

3. The nonrenewal of a teacher is not the taking of property. Nonrenewal for lack of a vacancy does not deprive a person of liberty. Board of Regents v. Roth (1972) 408 U. S. 564. Richards v. Board of Education (1972) 58 Wis. 2d 444.

4. If Appellants could allege and prove that there is a property right because of the 1972-73 master contract, the Appellant's argument establishes the very point Respondents have argued:

The dimensions of the property rights are limited to and defined by the contract, both the collective and the individual contract. The collective contract and each individual contract leaves the school board the power to discharge whether or not the school board is an "adversary".

Any property right is limited by this retention of authority.

The school board must contract with teachers in writing (Wis. Stat. 118.21) and the property conferred by such contract is necessarily limited by the next section, 118.22, which retains in the employer, as in all other employment relationships, the authority to discharge.

If the school board exceeds its authority, the property, which is the contract, gives the remedy of a breach of

contract action before the WERC. The Appellants, if they are correct that the Board took away property—as defined by the contracts—may sue for breach of contract before the courts or the WERC. The suit before WERC would not need to prove discrimination for union activity. WERC has jurisdiction over breach of collective bargaining agreements. Wis. Stat. 111.70(3)(a)5.

The most property that was ever granted was limited by the authority of the board to discharge, and subject to action for breach.

Any property granted by the master contract was also conditioned on not striking. (See the master contract, page 2, Grievance Procedure Section A, attached to Appellants' petition.) Appellants did strike. Employment—i.e. property—may be and was conditioned on not striking. Postal Clerks v. Blount, 325 F.Supp. 879, affirmed 404 U.S. 802 (1971).

Even if the property right granted was not conditioned on the employers right to discharge, or the employees refraining from a strike, the contract could and did constitute an agreement that the Board could discharge whether or not it was an adversary, and therefore constituted a waiver. D. H. Overmyer Co. v. Frick Co., (1972) 405 U.S. 173.

5. Even if Appellants could allege and prove a taking of property or a deprivation of liberty, they are not irreparably harmed. Judge Deehr so held. (A. App. 145) Appellants appear to claim a right to reinstatement and backpay. That is a complete remedy.

6. The Respondent District would be irreparably harmed by an injunction. Unless it nonrenews by March 15, it will by statute, be deprived of the opportunity to even argue the clear holding of Roth and Richards that nonrenewal is

not a taking of property. Under the Court's holding, a court could decide in effect that it would have been more reasonable to give in to all the strikers' demands, despite the fact that Wis. Stat. 111.70(1)(d) does not require a school board to make a bargaining concession.

7. No bond would secure the Board against the risk that an injunction could cause present teachers to quit, leaving the Board with inadequate staff. There is no showing how many of the striking teachers wish to return. An evidentiary hearing would, we believe, show that substantial numbers of them do not wish to return since they have moved or have contracts with other districts.

8. The replacement teachers at Hortonville would be irreparably harmed by an injunction. They are not parties to this action, nor is there any reason to nonrenew them, except the perhaps constitutionally impermissible reason that they did not violate the anti-strike ban. If the School Board is enjoined so that it cannot even argue that it could nonrenew, the Board might have to attempt to nonrenew the present teachers to reduce its liability.

9. Appellant's petition is not properly brought before the Supreme Court. There is no provision for such a motion. Appellants in effect are attempting to start an original action in Supreme Court.

10. The Court's decision states the Board's action in discharging was not improper, and indeed the Board was required to make a decision on what to do. The decision gives Appellants a right to ask a court to decide if another course would have been more reasonable. Until that right has been exercised, successfully, there is no basis for inferring wrongdoing in the Board's conduct.

The Order issued is effective until further order of the Court. Conferences are scheduled for February 25, 1975. We request the Order be vacated, and no injunction issued.

Respectfully submitted,

MELLI, SHIELS, WALKER & PEASE, S.C.
By /s/ JACK D. WALKER
/s/ JAMES K. RUHLY

DATED: February 24, 1975

STATE OF WISCONSIN
IN SUPREME COURT

[Caption omitted in printing]

AFFIDAVIT IN SUPPORT OF MOTION TO VACATE TEMPORARY RESTRAINING ORDER, AND OPPOSING MOTION FOR PERMANENT INJUNCTION

STATE OF WISCONSIN

ss.

COUNTY OF DANE

Jack D. Walker, being first duly sworn, states as follows:

1. He is one of the attorneys for the Respondents in the captioned case, and he makes this affidavit in support of the Respondents' motion to vacate the Temporary Restraining Order herein which was served February 22, 1975, and in opposition to Appellants' motion for permanent injunction. Affiant makes this affidavit because respondents and members of respondent board of education are unable to be in Madison this date due to weather conditions. This

affidavit is made on information and belief and upon documents in affiant's possession.

2. Members of the class of Appellants in this case and the Hortonville Education Association have regularly through at least Thursday, February 20, 1975, picketed the Hortonville schools, bearing picket signs stating they are on strike.

3. Neither members of the class of Appellants herein nor the Hortonville Education Association has terminated the strike nor made an unconditional offer to return to work, to the date of this affidavit.

4. The 1972-1973 master contract was not extended by the Board in March of 1974. Such contract in any event did not require nonrenewal be limited to just cause.

5. Respondent did give a notice of the reason for nonrenewal, e. g. ". . . there is presently no vacancy available." Such reason complies with the 1972-73 master contract, even if such agreement were applicable.

6. Approximately 57 of the persons to whom notices of consideration of nonrenewal were sent requested a conference with the Board. Approximately 24 responded and stated they did not want a private conference with the Board "since the Board is in an adversary position to me." Copies of a sample of each response are attached hereto and marked Exhibits "A" and "B" respectively. Three persons have not responded to the date of this affidavit.

7. Respondent Board of Education has a complete staff of teachers working who are competent; and the Board has no reason to nonrenew such persons.

8. Hortonville Education Association by its counsel has stated to the Wisconsin Employment Relations Commission in support of a motion to dismiss a petition for union election filed by a rival labor organization that "84 discharged employees may ask the court to decide for each of their cases the propriety of the strike and whether the Board's conduct in discharging them was warranted."

9. Respondents do not threaten Appellants with a loss of liberty or property.

Dated February 24, 1975.

/s/ JACK D. WALKER

[Subscription omitted in printing]

[EXHIBIT A, WALKER AFFIDAVIT]

Rt. 2
Whitewater, Wisc.
Feb. 14, 1975

Mr. Robert Hauk, Clerk

Board of Education
Hortonville Joint School District No. 1
111 East Cedar Street
Hortonville, WI 54944

Dear Mr. Hauk:

Pursuant to the provisions of Section 118.22 of the Wisconsin Statutes, I request a private conference with the Board of Education regarding the proposed nonrenewal of my teaching contract. You are further advised that I will be represented by the Hortonville Education Association

and its affiliates with respect to the proposed nonrenewal and at the private conference. By accepting a conference I do not waive my rights to a court hearing.

Very truly yours,

/s/ JERRY J. ADDIE

[EXHIBIT B, WALKER AFFIDAVIT]

1014 Shiocton Street
New London, Wisconsin
February 15, 1975

Mr. Robert Hauk, Clerk

Board of Education
Hortonville Joint School District No. 1
111 East Cedar Street
Hortonville, WI 54944

Dear Mr. Hauk:

This letter will acknowledge receipt of your letter advising me that the Board is considering the non-renewal of my contract. Please be advised that I do not desire a private conference with the board since the board is in an adversary position to me. Further I desire that all of my rights to employment and back pay to be adjudicated in the court proceedings which will begin shortly. My rejection of a conference is not to be construed in any way as a waiver of my entitlement to my job, to back pay or any other constitutional rights.

Very truly yours,

/s/ PATRICIA WEBER

Office of the Clerk
SUPREME COURT
STATE OF WISCONSIN
Madison, February 24, 1975

To: ROBERT H. FRIEBERT
Attorney at Law
Suite 440, 710 N. Plankinton Avenue
Milwaukee, WI 53203
MR. JACK D. WALKER
Attorney at Law
309 Insurance Building
Madison, WI 53703

Sir:—The Court today announced decision in your case as follows:

HORTONVILLE EDUCATION ASSOCIATION et al v. HORTONVILLE JOINT SCHOOL DISTRICT NO. 1 et al, No. 635

The order to show cause dated February 22, 1975, herein having come on for hearing on February 24, 1975, together with the respondents' motion to "vacate temporary restraining order and to deny permanent injunction" and case No. 635 still being pending in this Court, the decision and mandate in the case having been entered on February 5, 1975, and a motion for rehearing having been filed by respondents on February 24, 1975,

IT IS ORDERED that the order to show cause for temporary restraining order is denied.

IT IS FURTHER ORDERED that the temporary restraining order as entered on February 22, 1975, is vacated and

IT IS FURTHER ORDERED THAT this order is entered with the proviso that any determination by the respondent school board to not extend a teaching contract to the appellants herein for the school year of 1975-1976 is without prejudice to the rights of any party in case No. 635, the determination of whose rights must abide the hearing to be held by the circuit court in accordance with the mandate of this Court in case No. 635.

Respectfully yours,
/s/ ROBERT O. UEHLING
Clerk of Supreme Court.

STATE OF WISCONSIN
IN SUPREME COURT

August Term, 1974 No.635

HORTONVILLE EDUCATION ASSN. et al.,
Appellants,

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1, et al.,
Respondents.

PER CURIAM (on motions for rehearing). The last sentence on page 482, continuing on page 483 of 66 Wis. 2d 469 is revised as follows:

> "Whether the master contract between the board and the Hortonville Education Association and the contracts between the individual school teachers and the board are comparable to contracts involved in other cases where striking teachers were disciplined or discharged cannot be determined from the record in this case."

Motions for rehearing are denied without costs.

STATE OF WISCONSIN
IN SUPREME COURT

August Term, 1974 Case No. 635

[Caption omitted in printing]

MOTION OF RESPONDENTS FOR STAY TO PERMIT APPLICATION TO SUPREME COURT OF THE UNITED STATES FOR A WRIT OF CERTIORARI AND MEMORANDUM IN SUPPORT OF MOTION

TO: THE HONORABLE JUSTICES OF THE WISCONSIN SUPREME COURT:

Respondents respectfully present this, their application for an order staying enforcement of the decision of this Court rendered February 5, 1975, rehearing of which was denied March 28, 1975, for a reasonable time under the provisions of section 2101(f) of Title 28 of the United States Code, to enable petitioner to apply for and obtain a write of certiorari from the Supreme Court of the United States.

The grounds upon which said petition for certiorari will be based are as follows:

1. Respondents believe this Court's decision decided adversely to Respondents federal questions of substance not heretofore determined by the Supreme Court of the United States.

2. To the extent this Court decided adversely to Respondents federal questions of substance heretofore determined by the Supreme Court of the United States, Respondents believe this Court decided such questions in a way probably

not in accord with applicable decisions of the United States Supreme Court.

3. After this Court denied Respondents' motion for rehearing, the Supreme Court of Michigan on April 4, 1975 decided a school board could terminate striking teachers consistent with due process. A copy of the Michigan Supreme Court decision in Board of Education of the School District of Crestwood v. Crestwood Education Association is attached. A district court in Michigan and the New Hampshire Supreme Court have resolved the Constitutional question different from this Court's decision. Federation of Teachers v. Lake Michigan Community College (W.D. Mich., 1974) .. F. Supp. . .., 88 L.R.R.M. 2873; Farrelly v. Timberlane Regional School District (N.H. Sup Ct., 1974) 324 A.2d 723.

4. Appellants in this captioned case commenced a civil action in the United States District Court for the Eastern District of Wisconsin on April 1, 1975, Case No. 75-C-175 in which they seek to litigate the question whether federal due process requires an order of immediate reinstatement of striking teachers prior to the trial which this Court orders. The complaint in said civil action alleges this court has decided that the action taken to date by the Hortonville School Board was adjudicated by this Court to have violated Appellants' federal due process rights. A copy of the complaint in 75-C-175 is attached.

The reason why a stay is deemed necessary is that the de novo review mandated by this Court's decision would be unnecessary and would involve unwarranted time and expense for both parties if the United States Supreme Court should grant the writ of certiorari and reverse.

Dated April 16, 1975.

MELLI, SHIELS, WALKER & PEASE, S.C.
By /s/ JAMES K. RUHLY

[Board of Education of the School District of Crestwood v. Crestwood Education Association and copy of Complaint in U.S. District Court, E.D. of Wis., Case No. 75-C-175, omitted in printing]

STATE OF WISCONSIN
IN SUPREME COURT

August Term, 1974 No. 635

[Caption omitted in printing]

APPELLANTS' MEMORANDUM IN OPPOSITION TO RESPONDENTS' REQUEST FOR A STAY

FACTS

On February 5, 1975, this Court rendered a decision in the above captioned case reversing the trial court's determination. The Court held that the appellants had been denied due process of law when the Hortonville Board of Education, a party to an underlying dispute resulting in termination of the appellants' employment by the board, acted as the decisionmaker to impose punishment in a situation where due process of law was required. The decision went on to order that the Circuit Court sit as the decisionmaker with respect to determining whether the appellants did in fact engage in an unlawul strike and, if so, to determine what penalty, if any, is appropriate.

Motions for rehearing, raising different issues, were filed by both parties and were denied on March 28, 1975. After the teachers' motion for rehearing was denied, an action

under the Civil Rights Act was filed in Federal Court asking for reinstatement until such time as a determination is made by the independent decisionmaker. The teachers have not, however, repudiated either this Court's decision that the appellants were entitled to and were denied due process or the utilization of the Circuit Court as an independent decisionmaker to decide the appropriate penalty, if any.

The respondents have now indicated to the Court that they intend to petition the United States Supreme Court for a Writ of Certiorari and have asked this Court to stay its mandate. The request, if granted, would effectively allow the deprivation of due process that the appellants have now suffered for over a year to continue even longer. Therefore, the appellants ask the Court to consider this memorandum in opposition to the respondents' request.

ARGUMENT

A. The Federal Questions Decided by this Court are not Novel.

The first reason posed by the respondents for granting a stay is that the issue decided adversely to the respondents is a federal question of substance "not heretofore determined by the Supreme Court of the United States." While it is true that the Supreme Court apparently has not decided a case on exactly the same facts as this, it is inaccurate to suggest that the issues involved are novel. The Wisconsin Supreme Court decided that under Wisconsin law the appellants had a property interest in continued employment, that an allegation made against them that they had violated state law threatened their liberty, and that these considerations of Wisconsin law gave rise to a due process requirement. The

Court then recognized that one of the elements of due process is an independent decisionmaker. The Court was not deciding a federal question of substance "not heretofore determined by the Supreme Court of the United States" in that this Court relied entirely on United States Supreme Court decisions to support that proposition.

> "The requirement of an impartial decisionmaker is well established as an essential component of procedural due process. See Gibson v. Berryhill (1973), 411 U.S. 564, 578, 93 Sup. Ct. 1689, 36 L. Ed. 2d 488; Ward v. Village of Monroeville (1972), 409 U.S. 57, 60, 93 Sup. Ct. 80, 34 L. Ed 2d 267; Morrissey v. Brewer (1972), 408 U.S. 471, 485, 92 Sup. Ct. 2593, 33 L. Ed. 2d 484; Goldberg v. Kelly (1970) 397 U.S. 254, 271, 90 Sup. Ct. 1011, 25 L. Ed. 2d 287." Hortonville Education Association v. Hortonville Joint School District No. 1, 66 Wis. 2d 469, 491-492 (1975).

The Court then went on to find that because of Wisconsin's statutory duties imposed upon the board, the board was engaged in the collective bargaining process with the appellants and, therefore, the board members were "not uninvolved in the events which precipitated decisions they were required to make." Thus, because of the specific facts involved, the Court held that the board was not an impartial decisionmaker.

B. This Court's Decision is Clearly in Accord with Applicable Decisions of the United States Supreme Court.

The respondents do not cite any cases in support of their argument that this Court's decision is inconsistent with

any applicable decisions of the United States Supreme Court. Presumably, however, they are once again referring to Arnett v. Kennedy, 416 U.S. 134 (1974). Reference to the previous briefs filed in this case, particularly the briefs in support of and in opposition to the parties' motions for rehearing will show that this Court's decision is completely in accord with decisions of the United States Supreme Court defining property and liberty interests, the requirement of an independent decisionmaker, and the factual circumstances which render a decisionmaker partial.

Arnett, the only case from the United States Supreme Court which the respondents have relied on in this respect, is clearly inapposite as this Court has already concluded. 66 Wis. 2d at 495.

That this Court was correct in rejecting Arnett in this case is clear from subsequent decisions by the United States Supreme Court which have refused to consider Arnett in areas not arising under the Federal Civil Service law, the Lloyd-LaFollette Act, as was demonstrated to the Court in the Appellants' Brief in Response to Respondents' Motion for Rehearing at pages 8-11.

C. The State Court Cases Cited by the Respondents do not Support the Propositions Asserted.

The Michigan Supreme Court decisions of April 4, 1975, Board of Education of the School District of Crestwood v. Crestwood Education Association, . . Mich 2d . . (1975), supplied by the respondents, actually supports the accuracy of this Court's decision. The minority in that case, of course, agreed substantially with this Court and cited this Court's decision in support of their position. Page 12 of minority

opinion. The majority, despite the respondents' suggestions, largely agreed with this Court's opinion as well.

The majority opinion from the Michigan court agreed with this Court that engaging in a strike, even if unlawful, is not an abandonment of either the employment or the property interest involved. Page 8. That Court also accepted, at least arguendo, that a teacher's statutory rights under Michigan's Teacher Tenure Act constitute property. Page 7. That Court also found fault with a school board being a decisionmaker with respect to strike allegations.

> "Since the hearing will ordinarily be conducted by the employer, as the officer or body having general disciplinary authority, a Section 6 hearing is not an appropriate forum for the employee to assert in defense the employer's violation of the Act."
> Page 11.

The effective result of the majority opinion in Michigan is similar to this Court's opinion. The Michigan majority simply held that a school board could discharge teachers for striking without a hearing since a hearing was required shortly thereafter under existing Michigan law.

The Wisconsin Supreme Court, while holding that the school board was an improper decisionmaker, allowed the school board to make the initial decision and created a procedure for de novo review. This Court held that the school board was not a proper decisionmaker where property rights or liberty interests are involved and the school board is in an adversary position. That issue was not presented to the Michigan court. However, as noted above, in passing, the Michigan court agreed with that proposition. The practical result of both decisions is nearly the same. Because of

the remedy that this Court has provided, the respondent school board is also allowed to make the initial determination and the discharged employee has the burden to seek review. The Michigan case, while decided on a different basis, has the same result.

The respondents' continued reliance on Farrelly v. Timberlane School District, 324 A. 2d 723 (1974) is once again misplaced. As pointed out in the Appellants' Brief in Response to Respondents' Motion for Rehearing, at Page 13, the facts in Farrelly are nearly the opposite of the facts in this case.

D. The Effect of Withrow v. Larkin.

On April 16, 1975, the United States Supreme Court rendered its decision in Withrow v. Larkin. A copy of that decision is appended hereto. The respondents, by letter dated April 17, 1975, have suggested to the Court that that decision would justify not only a stay but reconsideration, although it appears from the letter that the respondents have not seen the decision. An examination of the opinion demonstrates beyond any reasonable question the accuracy of this Court's decision on the merits of the due process claim.

Larkin v. Withrow, 368 F. Supp. 796 (Ed.D. Wis. 1973) was a decision by a three judge District Court on a motion for a preliminary injunction which restained the Wisconsin Medical Examining Board from engaging in limited adjudicative functions with respect to charges it had also investigated. The United States Supreme Court reversed the decision of the three judge court upon a carefully limited conclusion that the combination of investigative and adjudicative functions does not, without more, automatically

constitute a due process violation as creating an unconstitutional risk of bias.

The three judge court decision was cited to this Court by the appellants in support of the proposition that one is entitled to an impartial decisionmaker when due process is required. This Court did not cite the lower court opinion in Larkin as support for its ruling. Even if it had, however, the United States Supreme Court's reversal would have had no adverse effect on this Court's decision.

As noted above, the ruling of the United States Supreme Court was on a narrow fact issue, that is, mixing of investigative and adjudicative functions by a body that is not involved in the underlying dispute giving rise to the threatened deprivation of property or liberty interests. In reaching its conclusion, the United States Supreme Court discussed due process rights in general and the right to an independent decisionmaker in particular in great detail. An examination of those discussions leads to the virtually undeniable conclusion that this Court was correct in its rulings on the merits of the appellants' claim.

In determining that there was no due process violation with respect to the mixing of functions involved in Larkin, the United States Supreme Court talked about situations which do present problems. The Court said:

> "Concededly, a 'fair trial in a fair tribunal is a basic requirement of due process.' In re Murchison, 349 U.S. 133, 136 (1955). This applies to administrative agencies which adjudicate as well as to courts. Gibson v. Berryhill, 411 U.S. 564, 579 (1973). Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.' Murchison, supra,

cf. Tumey v. Ohio, 273 U.S. 510, 532 (1927). In pursuit of this end, various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable. Among these cases are those in which the adjudicator has a pecuniary interest in the outcome and in which he has been the target of personal abuse or criticism from the party before him." Pages 10-11. (Footnotes omitted) (Emphasis supplied).

That paragraph not only reaffirms cases cited to and relied on by this Court, it also summarizes the situation involved in this case. The fair trial in a fair tribunal principle is applicable to administrative agencies, like school boards. A biased decisionmaker is unconstitutionally acceptable. Actual bias need not be shown, as long as a probability of unfairness is apparent. One situation in which that probability of unfairness is apparent is where the adjudicator has been party to a bitter dispute from which the charges of misconduct arise.

Larkin stands for the proposition that if an investigator has no relationship to the conduct for which punishment is sought, but acts as an adjudicator after having acted as an investigator, the probability of actual bias on his part is not inferrable unless something else is shown. It clearly recognizes, however, that if the adjudicator has other contacts, particularly with the conduct for which the penalty is sought to be imposed, a probability of actual bias disqualifying that person as a decisionmaker exists.[1]

[1]The Supreme Court was careful to note that actual bias need not be demonstrated. A "probability of actual bias" suffices. p. 11.

One of the cases cited in support of the general proposition stated by the United States Supreme Court on Pages 10 to 11 was Pickering v. Board of Education, 391 U.S. 563 (1968). The Court referred particularly to footnote (2) on Pages 578-579, from the appendix of the Court. In that footnote the following statement is made:

> "In the present case the trier of fact was the same body that was also both the victim of appellant's statements and the prosecutor that brought the charges aimed at securing his dismissal."

In Pickering, the Supreme Court declined to rule on the independent ground that the procedure described denied due process for lack of an impartial decisionmaker because the issue was raised for the first time in the Supreme Court. But the Court went on to say:

> "On the other hand, we do not propose to blind ourselves to the obvious defects in the fact finding process occasioned by the board's multiple functioning vis a vis appellant."

On Page 17 of Larkin, the United States Supreme Court also pointed out that Pickering was a different situation from that presented in Larkin. The Court distinguished Larkin from Pickering, on the ground that Pickering, unlike Larkin, involved a trier of fact that was the same body involved in the underlying dispute with the party sought to be penalized. Pickering, like Hortonville, involved a dispute between a teacher and the school board.[2]

[2]*Larkin* also demonstrates the correctness of this Court's decision with respect to the nonapplicability of *Arnett*. The statutory scheme of the medical examining board's operations would, presumably, support an *Arnett* argument at least to as great an extent as the school operations

On Page 11 of the Larkin opinion, the United States Supreme Court mentions that one approach in determining "probability of actual bias" is by undertaking "a realistic appraisal of psychological tendencies and human weakness . . ." The Wisconsin Supreme Court correctly analyzed the great temptation facing the board to expeditiously resolve their bitter labor dispute by firing the teachers, Realistically, it is too much to expect the board to be fair in imposing punishment upon those who they consider to be their tormentors.

The fact that the board was the combatant of the teachers also undercuts the critical distinction made at Page 17 of the Larkin decision. The United States Supreme Court distinguished In re Murchison, 349 U.S. 133 (1955) as follows:

> "Appelee relies heavily on In re Murchison, supra, in which a state judge, empowered under state law to sit as a 'one-man jury' and to compel witnesses to testify before him in secret about possible crimes, charged two such witnesses with criminal contempt, one for perjury and the other for refusing to answer certain questions, and then himself tried and convicted them. This Court found the procedure to be a denial of due process of law not only because the judge in effect became part of the prosecution and assumed an adversary position, but also because as a judge, passing on guilt or innocence, he very likely relied on 'his own personal knowledge and impression of what had occurred in the grand jury room,' an impression that 'could not be tested by adequate cross-examination."

statutes, if it were applicable. That it is not even mentioned by a unanimous Supreme Court dealing directly with the impartial decision-maker question is a clear indication that it is limited to cases arising under the federal civil service laws.

Obviously, the school board had been adversaries of the teachers for many months; they presumably believed in the righteousness of all of their positions; they had engaged in countless secret meetings and conversations; and they had discussed strategy upon strategy for dealing with their dispute. The members of the board, just like the "one-man grand jury" of Murchison, were adversaries of the teachers, had their own "knowledge and impression" of the facts developed from their own experiences and these beliefs and impressions "could not be tested by adequate cross-examination."

CONCLUSION

The appellants strongly oppose any stay in this case. While they agree with this Court on the merits of the constitutional claim, the appellants believe that they have still been denied a remedy in that the now declared constitutional deprivations which they have suffered in the past will continue to exist until a hearing before an impartial decision-maker. A stay would prolong the constitution deprivation even more.

The reasons given for the requested stay are totally insufficient. This Court's decision was completely consistent with existing law from the United States Supreme Court. If there had ever been any doubt about that it was clearly laid to rest with the recent decision of Withrow v. Larkin. Indeed, the Court's careful distinction in Larkin between situations like that presented in Larkin and those present in Pickering and the case before this Court, strongly supports this Court's February 5, 1975 ruling. The Larkin case suggests that either certiorari will be denied or, if granted, that the decision of this Court will be affirmed. Under such circumstances,

particularly in light of its effect, a stay would be highly inappropriate.

Respectfully submitted,

ROBERT H. FRIEBERT
THOMAS W. ST. JOHN

[Copy of United States Supreme Court decision in Withrow v. Larkin omitted in printing]

CORRECTED ORDER
Office of the Clerk
SUPREME COURT
STATE OF WISCONSIN

Madison, April 30, 1975

To: MR. JAMES K. RUHLY

Attorney at Law
Melli, Shiels, Walker & Pease
119 Monona Avenue
Madison, WI 53703

MR. ROBERT H. FRIEBERT
Attorney at Law
Samson, Friebert, Finerty & Burns
710 No. Plankinton Avenue
Milwaukee, WI 53203

Sir:—The Court today announced decision in your case as follows:

HORTONVILLE EDUCATION ASSOCIATION et al v. HORTONVILLE JOINT SCHOOL DISTRICT NO. 1 et al, No. 635.

The motion of respondents for an order to stay enforcement of the decision of this Court rendered February 5, 1975, for a reasonable period of time, having been considered by the Court,

IT IS ORDERED that the motion of the respondents for stay of the enforcement of the decision of this court rendered February 5, 1975, for a reasonable period of time is hereby granted.

IT IS FURTHER GRANTED that the enforcement of this decision is stayed for a period of ninety (90) days from the date of this order or until the further order of this court.

Respectfully yours,

ROBERT O. UEHLING
Clerk of Supreme Court

STATE OF WISCONSIN
IN SUPREME COURT

August Term, 1974 Case No. 635

[Caption omitted in printing]

MOTION FOR RECONSIDERATION OF STAY ORDER

On April 30, 1975, the Court granted the respondents' motion for a stay of enforcement of the decision of the Court rendered February 5, 1975. The Court granted the respondents a stay of ninety (90) days. The appellants request that the Court reconsider that decision, or, in the alternative, modify it so as to limit the stay period to no more than fifteen (15) days.

The effect of the Court's order, if not modified, will be to continue the now recognized deprivation of the appellants'

rights to such an extent that they may effectively be precluded from any meaningful decision by the impartial decisionmaker. The respondents had ninety days from the date of this Court's denial of their motion for rehearing in which to petition the United States Supreme Court for certiorari. By granting them a ninety day stay from April 30, 1975, this Court is inadvertently encouraging the respondents to delay their petition until the last possible moment and still have approximately thirty days of grace period before being required to answer the appellants' charges. If the respondents take advantage of the full ninety day period available to them for filing their petition, it is likely that the matter will not be considered by the United States Supreme Court until after the beginning of the next term in October, 1975. Thus, the deprivation of rights that has existed since April of 1974 will be allowed to continue well into the third school year affected.

This Court has already ruled that the appellants were denied their rights to due process of law. The appellants believe that the only way such a deprivation can be remedied is through their reinstatement until such time as due process is afforded. While the Court has not ordered reinstatement, it has recognized the constitutional infringement. The stay granted, however, clearly conflicts with the Court's ruling. The appellants request, therefore, that the Court reconsider its order of April 30, 1975, and deny the respondents' request for a stay. The appellants also renew their request for an order of reinstatement pending a hearing comporting with the principles of due process.

In the alternative, if the Court feels that a stay is appropriate, the appellants respectfully request that the stay be limited to a period of no more than fifteen (15) days. Because of the issues involved in this case, any action taken by the Court with respect to a stay should be designed to encourage, rather than discourage, a speedy application to the United States Supreme Court. Since the respondents have already had more than a month to prepare their petition, and since the issues to be raised therein have already been thoroughly briefed and discussed in this Court, there is no justification for a delay. That is particularly true in view of the nature of the case. If the respondents are to be given any stay at all, it should be only enough to allow them to prepare and file their petition as quickly as possible. Any stay beyond that time should be sought from the United States Supreme Court on the strength of the petition submitted.

Respectfully submitted,

ROBERT H. FRIEBERT
THOMAS W. ST. JOHN
Attorneys for Appellants

Office of the Clerk
SUPREME COURT
STATE OF WISCONSIN

Madison, May 7, 1975

Sir:—The Court today announced decision in your case as follows:

HORTONVILLE EDUCATION ASSN. et al v. HORTONVILLE JOINT SCHOOL DIST. NO. 1 et al, #635.

The motion of appellants for reconsideration of stay order rendered February 5, 1975, [SIC] or, in the alternative, to

modify it so as to limit the stay period to no more than fifteen (15) days, having been considered by the Court,

IT IS ORDERED that the motion be, and the same is hereby denied.

Respectfully yours,

ROBERT O. UEHLING
Clerk of Supreme Court

STATE OF WISCONSIN
IN SUPREME COURT

August Term, 1974 Case No. 635

[Caption omitted in printing]

MOTION TO VACATE ORDER STAYING EXECUTION OF JUDGMENT

The appellants by their attorneys, SAMSON, FRIEBERT, FINERTY & BURNS by ROBERT H. FRIEBERT, hereby move the Court for the entry of an order vacating the stay order previously entered in this case for the following reasons:

1. To date, the respondents have failed to serve and file any petition for certiorari in an effort to obtain review by the United States Supreme Court thereby demonstrating that they do not intend to pursue this matter in a speedy manner; and

2. An appropriate bond as required by 28 U.S.C. §2101(f) has not been filed. The appellants suggest that an appropriate bond in this case is $3,000,000 which represents the approximate value of salaries plus fringe benefits for which the respondents might be liable.

Dated at Milwaukee, Wisconsin this 7th day of June, 1975.

SAMSON, FRIEBERT,
FINERTY & BURNS
By Robert H. Friebert

STATE OF WISCONSIN
IN SUPREME COURT

August Term, 1974 Case No. 635

[Caption omitted in printing]

MEMORANDUM OPPOSING MOTION TO VACATE ORDER STAYING EXECUTION OF JUDGMENT

The Respondents, by their attorneys Melli, Shiels, Walker & Pease, S.C. by Jack D. Walker, hereby oppose Appellant's motion to vacate stay order, dated June 7, 1975, for the reasons stated herein.

1. Respondents' petition for certiorari has been printed and probably will be served and filed on the date this memorandum is filed.

2. Appellants asserted in their motion that 28 U.S.C. §2101(f) requires a bond. Actually the section states a stay "may be conditioned on the giving of security . . . ." (emphasis supplied).

3. Appellants did not raise any bond question either at the time the order was entered (April 30) or when they moved for "reconsideration" of the order (May 7, 1975). In respect of a bond, therefore, Appellants have waived the argument, and the question ought not be considered now because of Rule 251.70 which states motions respecting final determinations will not be considered after 20 days.

4. Wis. Stat. 274.26 states no bond is required of a school district to perfect an "appeal"; the statute states the appellate court may require security as a condition to further prosecution of the appeal. In this case the appellate court is now the U.S. Supreme Court.

5. No bond is needed because the school district is a government which will be neither more nor less responsible with a bond than without a bond.

6. Appellants present no facts to support the assertion a $3,000,000.00 bond, or any bond, is needed. Appellants still have not terminated their strike. There now is another determination by a court that Appellants did strike. See Michael Wisnoski, et al. v. Roger Weihing, et al., Docket No. 75-C-175 (E.D. Wis., June 4, 1975), a copy of which is attached hereto, at page 2.

7. The issue involved in the Hortonville case is of increasingly widespread importance to the conduct of municipal governments and administrative agencies. An example of developments since this Court's decision is the decision of Judge John G. Buchen in Naus v. Joint School District No. 1 of the City of Sheboygan Falls, et al., a copy of which is attached. In the Naus case the county court applied the Hortonville rationale to a nonrenewal, without a discussion whether the board and the teacher were adversaries.

Dated this 16th day of June, 1975.

MELLI, SHIELS, WALKER,
& PEASE, S.C.
By: Jack D. Walker

[Wisnoski v. Weihing, Docket No. 75-C-175 (E.D. Wis., June 4, 1975) and Naus v. Joint School District No. 1 of the City of Sheboygan Falls, et al., omitted in printing]

STATE OF WISCONSIN
IN SUPREME COURT

August Term, 1974 No. 635

[Caption omitted in printing]

AFFIDAVIT IN SUPPORT OF MOTION TO VACATE ORDER STAYING EXECUTION OF JUDGMENT

THOMAS W. ST. JOHN, being first duly sworn, on oath, deposes and states to the Court as follows:

1. That affiant is an attorney at law, duly licensed to practice law in the State of Wisconsin, and is one of the attorneys for the appellants above named.

2. That on the 17th day of June, 1975, along with Attorney ROBERT H. FRIEBERT, the affiant prepared a document entitled "Reply Brief in Support of Motion to Vacate Order Staying Execution of Judgment" in which, on pages 1-2 the statement was made that the respondents' delayed filing of their petition to the United States Supreme Court "appears to be a deliberate effort to prevent consideration during this term of the United States Supreme Court and to force consideration in the October, 1975 term of the United States Supreme Court."

3. That according to the official notice served upon Attorney ROBERT H. FRIEBERT by Attorney JACK D. WALKER, one of the attorneys for the respondents, the

petition for a writ of certiorari was docketed in the Supreme Court of the United States on June 19, 1975.

4. That pursuant to Rule 24, revised Rules of the Supreme Court, the petition is not distributed by the Clerk to the members of the United States Supreme Court for consideration until 30 days have expired from the filing of the petition unless there is an express waiver of the right to file a brief in opposition or such a brief is actually filed in a shorter time.

5. That the United States Supreme Court is now in its summer recess and will be so recessed until the beginning of the October, 1975 annual term commencing on the first Monday in October, 1975.

6. That according to information supplied to the affiant by Mr. PAUL JONES, Assistant Clerk, United States Supreme Court, no action will be taken on the petition for certiorari prior to reconvening of the Court for the October, 1975 term.

7. That this affidavit is made in support of the appellants' motion to vacate order staying execution of judgment.

Dated this 3rd day of July, 1975.

THOMAS W. ST. JOHN

Office of the Clerk
SUPREME COURT
STATE OF WISCONSIN

Madison, July 8, 1975

Sir:—The Court today announced decision in your case as follows:

#635 Hortonville Education Assn. et al. v. Hortonville Joint School Dist. No. 1, et al.

The motion of appellants to vacate the stay order of this court dated April 30, 1975, having been considered by the court,

IT IS ORDERED that the motion is denied without costs. (467 F4)

Respectfully yours,

ROBERT O. UEHLING
Clerk of Supreme Court

STATE OF WISCONSIN
IN SUPREME COURT

August Term, 1974 Case No. 635

[Caption omitted in printing]

MOTION OF RESPONDENT FOR CONTINUANCE OF THE STAY PREVIOUSLY GRANTED TO ALLOW APPLICATION TO THE SUPREME COURT OF THE UNITED STATES FOR A WRIT OF CERTIORARI AND MEMORANDUM IN SUPPORT OF MOTION

To: The Honorable Justices of the Wisconsin Supreme Court

Respondents respectfully petition this Court for an order continuing the stay of this Court's decision until such time as the United States Supreme Court acts on the petitions for certiorari now pending before it.

On April 30, 1975 this Court ordered:

"IT IS FURTHER GRANTED that enforcement of this decision is stayed for a period of ninety days from

the date of this order or until further order of this court."

The above order is requested because, consistent with respondents' original application for a stay of the decision and acting under that stay, respondents have filed a Petition for a Writ of Certiorari with the United States Supreme Court seeking review of aspects of this Court's decision which resolved federal questions of substance adversely to respondent. Said petition was filed with the United States Supreme Court on June 19, 1975.

On June 26, 1975 appellants filed a petition for certiorari, entitled "Conditional Cross-Petition for a Writ of Certiorari to the Supreme Court of Wisconsin." Therein appellants request review of: (1) this Court's failure to order their immediate reinstatement with backpay, contending that the absence of such relief denies due process of law; and (2) this Court's failure to hold that Wisconsin's prohibition of public employee strikes denies equal protection of the law. The appellants' petition is stated to be conditional and requests review of the above described aspects of this Court's decision in the event that respondents' petition is granted. Respondents' brief in response to appellants' petition is due on July 28, 1975.

The reason why a continuation of the stay is deemed necessary is that the repleading and trial mandated by this Court's decision would be unnecessary and require the unwarranted expenditure of time and money by the parties as well as the trial court if the United States Supreme Court should grant either writ of certiorari and reverse or modify this Court's decision. This Court granted the stay in order to allow the filing of a petition for certiorari. Petitions have

been filed. Respondents have requested that the record be forwarded to the United States Supreme Court. The stay should be extended consistent with its original purpose.

Dated: July 22, 1975.

MELLI, SHIELS,
WALKER & PEASE, S.C.
By: /s/ JACK D. WALKER

STATE OF WISCONSIN
IN SUPREME COURT

August Term, 1974 Case No. 635

[Caption omitted in printing]

APPELLANTS' MEMORANDUM IN OPPOSITION TO RESPONDENTS' MOTION FOR CONTINUANCE OF STAY

On July 22, 1975, the respondents moved the Court for an Order continuing the stay of this Court's mandate until such time as the United States Supreme Court acts on their petition for certiorari. The appellants oppose the requested extension.

The Court entertained the appeal in this matter on an expedited basis because of the urgency of the matters presented. The decision of the Court requiring due process hearings for the appellants was rendered in February, 1975. Because of the stay previously issued, however, the appellants have had no effective remedy.

During the course of previous proceedings with respect to the respondents' request for a stay, the appellants advised the Court that the timetable being utilized by the respon-

dents was such as to preclude any meaningful review of the respondents' petition by the United States Supreme Court until the October, 1975 Term. The appellants warned the Court that the respondents would simply continue petitioning the Court for an extension of the stay on the grounds that the United States Supreme Court would not be able to consider their petition until the October Term. However, the appellants also pointed out that if the respondents had acted diligently that problem would not exist. Thus, while the present Motion before the Court was totally predictable, the reasons for the requested extension are largely the product of the respondents' own making.

This Court has given the respondents more consideration than their position justifies. The appellants request, therefore, that the Court either vacate the stay or allow the stay to end as a matter of course. The respondents will then be able to seek a stay, as they should have in the first instance, from the United States Supreme Court on the strength of their petition. Since a stay is originally directed to the Circuit Justice, there is no need for the Court to be in session in order for the respondents to make their application and have it considered.

Alternatively, if the Court decides to continue the stay, the appellants request that such continuation be conditioned on the filing of a bond by the respondents sufficient to cover another year of potential lost wages to the appellants.

Dated this 29th day of July, 1975, at Milwaukee, Wisconsin.

Respectfully submitted,

FRIEBERT & FINERTY
By: /s/ THOMAS W. ST. JOHN
Attorney for Appellants

Office of the Clerk
SUPREME COURT
STATE OF WISCONSIN

Madison, August 1, 1975

Sir:—The Court today announced decision in your case as follows:

#635 Hortonville Education Assn. et al. v. Hortonville Joint School Dist. et al.

The motion of the appellants for an extension of the stay of proceedings ordered by this court on April 30, 1975, having been considered by the court, and the court having determined that the purpose of the stay order has been accomplished, in that the appellants have been permitted sufficient time to apply to the United States Supreme Court for a writ of certiorari and have so applied,

IT IS ORDERED that the motion is denied. No costs taxed.

Respectfully yours,

ROBERT O. UEHLING
Clerk of Supreme Court

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974
No. 74-1606

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; BOARD OF EDUCATION OF HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; ROGER WEIHING, ROBERT HAUK, JEAN MEADS, FLOYD MEY-

ER, MERLIN PLAMANN, VICTOR SCHROTH and RONALD SURPRISE, individually and as officers and members of the Board of Education of Hortonville Joint School District No. 1; and MARVIN OBRY, ROBERT KOHLS and GENE RIEDL, individually and as administrators of Hortonville Joint School District No. 1,

Petitioners,

v.

HORTONVILLE EDUCATION ASSOCIATION and MICHAEL WISNOSKI, ROSE MARIE OLSON, THOMAS NADEAU, JUDY MURPHY, RUSSEL LICHTE and RONALD HAMMOND,

Respondents.

APPLICATION FOR STAY OF MANDATE OF THE WISCONSIN SUPREME COURT PENDING REVIEW ON CERTIORARI

TO: The Honorable William H. Rehnquist, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Seventh Circuit

Petitioners, the Hortonville Joint School District No. 1, pray for an order staying the mandate of the Wisconsin Supreme Court pending final determination of the matter by this Court. In support of this application, petitioners respectfully show as follows:

A. Statement of the Case. Petitioners are a Wisconsin school district, the school board, its elected members and its agents. Under the laws of the State of Wisconsin, petitioners operate a public school system charged with serving the educational needs of a rural community of 8,500 persons. On March 18, 1974, the teaching employees of the school district went on strike. The superintendent twice advised each teacher that the strike was illegal under the laws of Wisconsin and invited the teacher to return to work. The teachers continued their strike. The superintendent informed the school board of the strike. The board scheduled hearings and notified the individual teachers of the hearings and their purpose. After hearing, at which the individual teachers were represented by counsel, the board terminated the striking teachers and hired replacements. On April 4, 1974, respondents, the Hortonville Education Association, a labor union affiliated with the largest statewide teacher's labor union and the National Education Association, commenced this action alleging that the discharges were unlawful under state law and the due process clause of the Federal Constitution and prayed for an order preventing the board from reopening the schools by hiring replacement teachers. The trial court denied a request for temporary relief and thereafter granted petitioners' motion for summary judgment, holding that the discharges were authorized under state law and that respondents were not denied due process of law.

On appeal respondents argued that the procedure followed by the school board in terminating them denied due process in only one respect, i.e., "the lack of an impartial decisionmaker." The Wisconsin Supreme Court, after resolving all state law issues in favor of petitioners, and specifically relying on a statement in Morrissey v. Brewer, 408 U.S. 471 (1972), held that the elected school board was prohibited by the federal Constitution from discharging the illegally striking teachers because "the board was not an impartial decisionmaker in a constitutional sense." The Wisconsin Supreme Court expressly found no actual or personal bias on the part of the members of the school board. Thus,

though: (1) state law vested the decision to discharge exclusively in the elected school board; (2) the teachers admitted to being on strike in violation of state law; and (3) the schools were closed by the strike, the Wisconsin Supreme Court decided that Morrissey compelled a holding that procedural due process under the Fourteenth Amendment required the displacement of the employer (the school board) as decisionmaker because the board also had collective bargaining responsibilities. Recognizing, however, that the application of Morrissey to resolve the process due in this situation produced an untenable result, the Court's remedy was to create a new cause of action to be brought in a state trial court and at which the respondents could attempt to show that a "more reasonable" course of action was open to the school board.

Petitioners seek review of the Wisconsin Supreme Court's holding on the procedural due process issue in No. 74-1606. The remedy fashioned by the state court is the subject of respondents' Conditional Cross Petition for Certiorari, No. 74-1638. That petition also seeks review of an equal protection claim, first raised before the State Supreme Court, but decided adversely to respondents on the merits.

B. Reasons for Granting the Writ. The Petition raises at least two major questions warranting review by this Court:

(1) The decision below seriously misconstrues this Court's decision in Morrissey v. Brewer, 408 U.S. 471 (1972) and Arnett v. Kennedy, 416 U.S. 139 (1974), as construed by this Court in Withrow v. Larkin, 43 U.S.L.W. 4459-67 (April 16, 1975), decided after the decision below.

Morrissey does not suggest that procedural due process prohibits an elected school board, charged by state law with

providing universal education and accountable to taxpayers and parents of school children, from making a policy decision permitted by state law because it also has the responsibility for collectively bargaining. See, Withrow v. Larkin, supra. As noted in the Brief in Opposition to the Conditional Cross Petition of respondents (No. 74-1638), the remedy fashioned by the Wisconsin Supreme Court itself reveals the inapplicability of Morrissey to this case.

(2) Decisions by the highest courts of other states and the Circuit Court of Appeals for the District of Columbia hold, in conflict with the decision below, that a public employer does not violate due process by terminating illegally striking employees. (See cases cited at pages 11-12 of the Petition for Certiorari.) The decision below is also in direct conflict with Federation of Teachers v. Community College, (Civil Nos. 74-2323 and 74-2324, 6th Cir. July 2, 1975), unofficially reported at 89 LRRM 2865, decided after the decision of the Wisconsin Supreme Court.

C. Jurisdiction. The jurisdiction of this Court to review the case on petition for certiorari rests upon 28 U.S.C. 1257(3). Jurisdiction to issue a stay rests upon 28 U.S.C. §2101(f).

The decision below is final within the meaning of 28 U.S.C. §1257. The remaining litigation is a newly created proceeding on separate and independent issues. No federal questions remain. It is the substitution of the trial court for the school board as decisionmaker that is sought to be reviewed. Further, the constitutional issue may not be preserved if the ordered proceeding takes place. If the petitioning school board is successful, a case or controversy may no

longer exist, yet the board has still been ousted as the arbiter of policy in the district. The decision below is final and ripe for review by this Court because the remaining litigation is independent of the federal question and completely unnecessary if review is granted and the decision below reversed. North Dakota Pharmacy Board v. Snyder's Stores, 414 U.S. 156 (1973); Organization For a Better Austin v. Keefe, 405 U.S. 415, 418 (1971); Harris v. Washington, 404 U.S. 55, 56 (1971); Mills v. Alabama, 384 U.S. 214 (1966); Hudson Distributors, Inc. v. Eli Lilly & Co., 377 U.S. 386 (1964); Local No. 438 v. Curry, 371 U.S. 542 (1963); Mercantile National Bank v. Langdeau, 371 U.S. 555 (1963).

D. Prior Stay Proceedings. On April 16, 1975 petitioners moved the Wisconsin Supreme Court for a stay pursuant to 28 U.S.C. §2101(f). The motion requested a reasonable time to apply for and obtain a writ of certiorari from this court. (Exhibit A, attached) On April 30, 1975 the state Supreme Court ordered that petitioners motion for a stay for a reasonable period of time be granted. (Exhibit B, attached) That order further stayed enforcement for a "period of ninety days or until further order of the court."

Thereafter respondents moved the Wisconsin Supreme Court for an order vacating the stay granted April 30 or, in the alternative, limiting the period of the stay to fifteen days. On May 7, 1975 the Wisconsin Supreme Court denied that motion. (Exhibit C, attached) On June 4, 1975 the District Court for the Eastern District of Wisconsin dismissed an action brought by respondents against petitioners on the grounds that it was an attempt to have that federal court review the judgment of the Wisconsin Supreme Court. Three

days later respondents again moved the Wisconsin Supreme Court to vacate its stay order and, for the first time, urged that a bond be posted. (Exhibit D, attached) Both parties filed briefs and on July 8, 1975, the Wisconsin Supreme Court denied the motion to vacate the stay and the request for a bond. (Exhibit E, attached)

On June 19, 1975 petitioners filed their Petition for a Writ of Certiorari and on June 26, 1975 respondents filed a conditional cross-petition for certiorari requesting review of an equal protection issue and the remedy created below.

On July 22, 1975 petitioners moved the Wisconsin Supreme Court for an order extending the stay which was to expire on July 30, 1975, until this Court acted on the respective petitions. On August 1, 1975 the Wisconsin Supreme Court denied petitioners' motion for an extension of the stay on the grounds "that the purpose of the stay order has been accomplished, in that the appellants have been permitted sufficient time to apply to the United States Supreme Court for a writ of certiorari and have so applied." (Exhibit F, attached)

E. Reasons for Extending the Stay. The stay should be extended to avoid irreparable harm and to correct a misconception of 28 U.S.C. §2101(f) by the Court below.

(1) The Wisconsin Supreme Court, after argument, granted petitioners' request under 28 U.S.C. §2101(f) for a reasonable time to apply for and obtain a write of certiorari. That court, not petitioners, selected ninety days. Thereafter respondents twice sought to vacate or shorten the stay on the grounds that the ninety day period might or would prevent this Court from acting on the stay until the October term 1975. The Wisconsin court rejected those arguments

and refused to require a bond. Those orders reflect the state court's evaluation of the equities involved and is entitled to deference. By twice refusing to limit the stay, it was determined that petitioners' interest in review by this Court without simultaneously having to proceed with a newly fashioned remedy overbalanced respondents' interest in beginning a lengthy and possibly unnecessary proceeding.

The declination to continue the stay reflects a misreading of 28 U.S.C. §2101(f). The order declining to extend the stay cites as its only grounds that the purpose of the stay has been accomplished because the petition has been filed. That is not the purpose of a stay granted under 28 U.S.C. 2101(f). That section authorizes stays for a reasonable time to obtain a writ. Petitioners moved for a stay under §2101(f) and that motion was granted on April 30, 1975.

Alternatively, the Wisconsin Supreme Court's action in not extending the stay can be interpreted only as a decision that it was without jurisdiction to continue the stay because the petitions had been filed. Again, 28 U.S.C. §2101(f) empowers the Wisconsin Supreme Court to continue the stay until the matters before this Court are finally resolved.

Any other construction of the action below is inconsistent with the granting of the original stay. No changed circumstances have been alleged other than that the petitions have been filed with this Court. Objections to the duration of the stay were raised below by the respondent union and rejected by the Wisconsin Court.

(2) Failure to continue the stay visits irreparable harm on the petitioner and the public it represents yet does not harm respondents. A stay prevents commencement of the lengthy proceeding determined below to be constitutionally

necessary. That proceeding is unnecessary if either petitioners or respondents have their petitions granted and this Court reverses.

Petitioners' interests in continuing the stay is the avoidance of the expenditure of sizable amounts of public money in unnecessary litigation and the avoidance of the confusion, uncertainty and administrative interference that would result from an unnecesary proceeding commenced at the start of the school year. These expenditures would not be recoverable.

Respondents are not harmed by continuance of the stay for approximately eight weeks. They have publicly claimed entitlement to backpay and therefore suffer no irreparable harm. Further, under Wisconsin practice rules it is not possible for a trial court to reach a decision before school opens in late August.

WHEREFORE, petitioners pray that the judgment and mandate of the Wisconsin Supreme Court, previously stayed pending a final determination of the matter by this Court.

Respectfully submitted,

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Counsel for Petitioners
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DATE: August 8, 1975

Exhibits atttached to application printed in the Appendix as follows:

Exhibit A at page ——— 285-87
Exhibit B at page ——— 298-99
Exhibit C at page ——— 301-02
Exhibit D at page ——— 302
Exhibit E at page ——— 306-07
Exhibit F at page ——— 311

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1606

[Caption omitted in printing]

OPPOSITION TO PETITIONERS' APPLICATION FOR STAY OF MANDATE OF THE WISCONSIN SUPREME COURT PENDING REVIEW ON CERTIORARI

TO: The Honorable William H. Rehnquist
Associate Justice of the Supreme Court
of the United States and Circuit Justice
for the Seventh Circuit

The petitioners have filed an application for a stay of the mandate of the Wisconsin Supreme Court on the strength of their petition for a writ of certiorari to the Wisconsin Supreme Court previously filed. The Respondents oppose the application.

I.

STATEMENT OF CASE

The statement of the case presented by the petitioners in the application is both incomplete and misleading. A more complete and accurate statement can be found by examining the conditional cross-petition for writ of certiorari to the Supreme Court of the State of Wisconsin, October Term, 1974, No. 74-1638, which was filed by the respondents in this case. The conclusions of the Wisconsin Supreme Court which are being challenged by the petitioners are more accurately explained in the brief for respondents in opposition which was previously filed in this case.

The essential facts necessary to resolve the present application for a stay are not complicated. In the spring of 1974 the teachers attempted to engage the school board in meaningful collective bargaining not only for the 1974-75 school year but for the year that was coming to an end as well. The teachers felt that they had demonstrated their good faith by working nearly the entire year then ending even though they had yet to reach agreement for that year, something which would ordinarily have been done at the end of the previous year. Concluding that the failure to reach agreement was due to a lack of good faith bargaining by the employers and that the employers were attempting to destroy their union, the teachers engaged in a work stoppage.

The school board's response was to pay deference to formalities and order precipitous and meaningless disciplinary hearings which had the inevitable result of terminating the teachers' employment. The teachers initiated suit in the Circuit Court claiming, among other things, a denial of due process of law with respect to the nature and procedures utilized for the hearings and the obvious partiality of the decisionmaker, which happened to be the board of education, their adversary in the underlying dispute.

The Circuit Court held, among other things, that applicable Wisconsin statutes gave the teachers an expectation of continued public employment rising to a level of a property

right and that charges of striking in violation of Wisconsin's public employee strike prohibition were such serious accusations in Wisconsin as to threaten the teachers' liberty interests. Although finding that the teachers were therefore entitled to due process protections, the Circuit Court concluded that since there was little dispute as to the fact of the strike, there could be little objection to the propriety of the discharges, regardless of any other shortcomings. Thus, the Circuit Court granted summary judgment in favor of the school board.

While many issues were raised on appeal to the Wisconsin Supreme Court, the one relied on by the petitioners for purposes of this application was decided in the teachers' favor. The Wisconsin Supreme Court agreed with the Circuit Court that due process was required. It parted company with the Circuit Court from that point on, because it recognized that discharge is not an automatic penalty for striking in Wisconsin but rather that the discipline to be imposed upon public employee strikers, if any, depends on the underlying circumstances of the case. The court went on to find that local circumstances caused by applicable Wisconsin law, which placed one party to a dispute in the position of being the other party's judge for charges resulting from that same underlying dispute constituted a denial of a neutral and unbiased decisionmaker and therefore denied due process of law. The Wisconsin Supreme Court held that the situation created under state law allowed the school board to conclude the bargaining process on its own terms by exercising the expedient power to discharge the teachers who were their adversaries in the negotiating process. The possession of such a weapon by one of the parties to an underlying dispute was said to create such a real risk of

partiality when that party sat as a decisionmaker with respect to the other party's conduct as to violate fundamental principles of fairness.

The court did not make a final decision on the merits of the real issue involved between the parties presently before this court, that is the appropriateness of any penalty to be imposed under the circumstances. What it did was to vacate the summary judgment entered by the Circuit Court and remand the matter to the trial court for hearings of a de novo nature in which the trial court was to decide the penalty, if any, which could properly be imposed against the teachers under the circumstances. The court also set up a similar procedure for the future in cases arising under like circumstances.

The decision of the Wisconsin Supreme Court was rendered in February of 1975. It is now August of 1975 and the de novo hearings designed to satisfy due process have yet to be held. The Wisconsin Supreme Court stayed its mandate at the request of the petitioners for the purpose of allowing the petitioners to seek a writ of certiorari from this court. The petitioners delayed their applicaton to such an extent that it became impossible for this court to consider the merits of the petition prior to reconvening for the October, 1975 Term. Had the petitioners acted diligently, there would be no need for the stay now being sought from this court. The pattern suggests a deliberate attempt to utilize this court's summer recess to delay resolution of the merits of this case to such an extent that the teachers will necessarily be precluded from returning to work for another year. It is against that background that the respondents oppose the present petition for a further stay. Alternatively, if a stay is to be granted, the respondents ask that it be conditioned

upon the filing of adequate security to provide compensation for the respondents sufficient to cover another year of lost employment. The amount involved for the teachers each year is in the neighborhood of one million dollars.

II.

REASONS FOR DENYING THE APPLICATION

A consideration of the factors involved in this case, as well as the standards for consideration of stay applications dictates that the application in this case should be denied.

A. The Action of the Court Below.

As noted in the petitioners' application, the Wisconsin Supreme Court has already given the petitioners ample time to seek a writ of certiorari. The petitioners, had they been diligent, could have filed their petition in sufficient time so as to possibly receive consideration prior to this court's summer recess. The issues in the case had been fully briefed at two levels within the state system and it was not a major undertaking to prepare the petition for certiorari. The Wisconsin Supreme Court, having given the petitioners ninety days in which to secure review allowed the stay order to terminate this month. Due respect should therefore be given to the action of the Wisconsin Supreme Court. Magnum Company v. Coty, 262 U.S. 159, 164 (1923).

B. Enforcement of the Mandate Below Will Neither Moot the Issues Nor Cause Irreparable Harm.

The mandate of the Wisconsin Supreme Court does not resolve the issues between the parties. All it does is direct that the teachers have a fair hearing in order to determine

the appropriateness of any penalty to be imposed upon them for engaging a strike. Allowing the remand order of the Wisconsin Supreme Court to be operative simply allows the de novo hearings ordered in February, 1975 to begin. Another stay, at this point, would certainly cause irreparable harm to the teachers, the successful parties in the Wisconsin Supreme Court, in that they would be required to wait even longer to begin the due process hearings to which they were entitled in April of 1974. The balance of equities in this case clearly favors denial of the application. United States v. United Liquors Corporation, 77 S. Ct. 208, L.Ed. 2d 32 (1956).

C. The issues Presented by the Petitioners do not Stand a Reasonable Chance of Being Reviewed.

A prime consideration in determining whether to grant a stay is an assessment of the likelihood that a sufficient number of justices will vote to consider the case on certiorari. Such a result is highly unlikely in this case. As noted in the brief in opposition, jurisdiction, which is said to exist under 28 U.S.C. §1257(3), is absent. What is sought to be appealed here is an interlocutory order which does nothing more than vacate a summary judgment and remand the issues involved to the trial court. Since there is no final judgment or decree, this court lacks jurisdiction. Montgomery Building & Construction Trades Council v. Ledbetter Erection Company, 344 U.S. 178, 180-81 (1952).

D. No Novel Question is Presented by this Case.

The Wisconsin Supreme Court found that the teachers had property and liberty interests arising by virtue of state

law and, therefore, that due process was required. That finding was clearly in accord with applicable decisions of this court. Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sinderman, 408 U.S. 593 (1972); and Goldberg v. Kelly, 397 U.S. 254 (1970). The court also found that one of the elements due process requires is an independent decisionmaker. That was not a novel decision either. Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972); and Tumey v. Ohio, 273 U.S. 510 (1927). Finally, the Wisconsin court made a finding based on its unique insights into local laws and local realities that the special facts and circumstances present in the case made the risk of unfairness, considering the school board's multiple functioning, intolerably high. Withrow v. Larkin, 417 U.S. 943, 43 U.S.L.W. 4459 at 4466 (1974).

E. The Mandate of the Wisconsin Supreme Court has no Drastic Impact.

As previously noted, the mandate of the Wisconsin Supreme Court does nothing more than direct that a determination of the penalty to be imposed against the teachers, if any, as a result of their conduct be made by a fair arbitor. Neither party has won or lost the underlying issues at this stage and by no stretch of the imagination is the decision of the Wisconsin Supreme Court of such a nature that its effect must be stayed pending review. International Boxing Club v. United States, 78 S. Ct. 4, 2 L.Ed. 2d 15 (1957).

III.

CONCLUSION

On the basis of the foregoing factors, the respondents respectfully request the court to deny the petitioners' application for stay. Alternatively, if the stay is to be granted,

it is requested that it be conditioned upon the giving of adequate security pursuant to 28 U.S.C. §2101(f) and Rule 18 of the Revised Rules of the Supreme Court. The amount of security requested under such circumstances is two million dollars, which represents the approximate salary and benefit loss to the teachers should the stay effectively allow the petitioners to keep the teachers out of work for a second year.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. A-133 (74-1606)

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1 et al.,

Petitioners,

v.

HORTONVILLE EDUCATION ASSOCIATION et al.

ON APPLICATION FOR STAY

[August 18, 1975]

Mr. Justice Rehnquist, Circuit Justice.

If the judgment of the Supreme Court of Wisconsin were plainly a "final judgment" for purposes of 28 U.S.C. §1257,

and if it plainly rested solely upon a construction of the Fourteenth Amendment to the United States Constitution, I would be inclined to grant the stay requested by the applicant School Board. I think that none of our cases require the conclusion, reached by the Wisconsin court, that a school board may not be allowed to dismiss teachers which it employs because it is not the sort of impartial decisionmaker required by due process of law. If this matter were before me on the petition for certiorari where I would be casting my vote as a Member of the Court, I would conclude that the judgment of the Supreme Court of Wisconsin did rest solely upon the Fourteenth Amendment. But in my capacity as Circuit Justice, where I act "as a surrogate for the entire Court," Holtzman v. Schlesinger, 414 U.S. 1304, 1313 (1973) (Marshall, J., in chambers), doubts as to whether the judgment may not rest also upon a construction of the Wisconsin Constitution, and as to the finality of the judgment, lead me to deny the application.

STATE OF WISCONSIN OUTAGAMIE COUNTY

CIRCUIT COURT

HORTONVILLE EDUCATION ASSOCIATION, et al,
Plaintiffs,

vs.

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1, et al,

Defendants.

ORDER STAYING PROCEEDINGS

Upon the motion of the defendants, by MELLI, SHIELS, WALKER & PEASE, S.C., their attorneys, and with the

consent of the plaintiffs, by their attorneys, FRIEBERT & FINERTY,

IT IS ORDERED:

That all proceedings with respect to the first cause of action of the first amended complaint in the above captioned case and all proceedings pursuant to the mandate of the Wisconsin Supreme Court directing a de novo determination be and hereby are stayed until such time as the United States Supreme Court has rendered a decision in Case No. 74-1606, October Term, 1974, Hortonville Joint School District No. 1, et al v. Hortonville Education Association, et al, which is before the Court on a writ of certiorari to the Supreme Court of the State of Wisconsin, and Case No. 74-1638, October Term, 1974, Hortonville Education Association, et al v. Hortonville Joint School District No. 1, et al, should the conditional cross petition for a writ of certiorari to the Supreme Court of the State of Wisconsin be granted in that case.

IT IS FURTHER ORDERED:

That the consent of the plantiffs to the stay requested by the defendants shall not be construed in any further proceedings in this Court as a waiver of claims for damages, if any, accruing during the period of the stay, shall not operate to toll the running of any damages incurred by the plaintiffs or otherwise be considered as limiting said damages, shall not in any manner be considered as a factor in determining what relief, if any, is due the plaintiffs, nor as tolling any duty to mitigate any damages claimed, and shall not in any other manner be considered as affecting the merits of this action.

Dated this 22nd day of October, 1975.

/s/ ALLAN J. DEEHR
Circuit Judge

Supreme Court, U. S.
FILED
JUL 15 1975
MICHAEL RODAK, JR., CLERK

No. 74-1606

In the Supreme Court of the United States

OCTOBER TERM, 1974

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; BOARD OF EDUCATION OF HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; ROGER WEIHING, ROBERT HAUK, JEAN MEADS, FLOYD MEYER, MERLIN PLAMANN, VICTOR SCHROTH and RONALD SURPRISE, individually and as officers and members of the Board of Education of Hortonville Joint School District No. 1; and MARVIN OBRY, ROBERT KOHLS and GENE RIEDL, individually and as administrators of Hortonville Joint School District No. 1,

Petitioners,

VS.

HORTONVILLE EDUCATION ASSOCIATION and MICHAEL WISNOSKI, ROSE MARIE OLSON, THOMAS NADEAU, JUDY MURPHY, RUSSEL LICHTE and RONALD HAMMOND,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Wisconsin

BRIEF FOR RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

October Term, 1974

No. 74-1606

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; BOARD OF EDUCATION OF HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; ROGER WEIHING, ROBERT HAUK, JEAN MEADS, FLOYD MEYER, MERLIN PLAMANN, VICTOR SCHROTH and RONALD SURPRISE, individually and as officers and members of the Board of Education of Hortonville Joint School District No. 1; and **MARVIN OBRY, ROBERT KOHLS and GENE RIEDL,** individually and as administrators of Hortonville Joint School District No. 1,

Petitioners,

vs.

HORTONVILLE EDUCATION ASSOCIATION and MICHAEL WISNOSKI, ROSE MARIE OLSON, THOMAS NADEAU, JUDY MURPHY, RUSSEL LICHTE and RONALD HAMMOND,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Wisconsin

BRIEF FOR RESPONDENTS IN OPPOSITION

Pursuant to Rule 24 of the revised Rules of the Supreme Court of the United States, respondents (who are appel-

lants below and conditional cross-petitioners in No. 74-1638) oppose the petition filed in this case on the grounds that this Court does not have jurisdiction thereof, there being no final judgment. In addition, there are no special and important reasons for granting review in this case and the considerations of Rule 19 of the revised Rules of the Supreme Court of the United States are not present.

STATEMENT OF THE CASE

The statement of the case presented by the petitioners is both incomplete and argumentative. The respondents have filed a Conditional Cross-Petition for Writ of Certiorari to the Supreme Court of the State of Wisconsin, No. 74-1638, in which a more accurate statement of the case is presented.

ARGUMENT

I. THIS COURT DOES NOT HAVE JURISDICTION TO ENTERTAIN THE PETITION.

Jurisdiction for this Court to entertain the petition is said to exist under 28 U.S.C. §1257(3). That section allows review by this Court of decisions rendered by the highest court of a state under certain circumstances, but only if they are "final judgments or decrees". Without a final judgment or decree this Court lacks jurisdiction. *Montgomery Building & Construction Trades Council* v. *Ledbetter Erection Co.*, 344 U.S. 178, 180-81 (1952). In order for this Court to have appellate jurisdiction, the state court judgment must be final in two respects:

> "It must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market Street R. Co.* v. *Railroad Commission,* 324 U.S. 548, 551 (1945).

What is sought to be reviewed here is simply not a final judgment. The trial court had granted summary judgment for the petitioners (defendants and respondents below) on one cause of action and had sustained their demurrers to three others. The Wisconsin Supreme Court reversed the trial court's grant of summary judgment and remanded the case back to that court. At this time, this case effectively involves a petition for certiorari from a denial of a motion for summary judgment. Further proceedings with respect to the ultimate question involved in

this case, that is whether the teachers should have been fired, are to be conducted in the trial court. When that court ultimately decides the matter, its decision will again be appealable by either side to the Wisconsin Supreme Court. Thus, the case is subject to further review by the Wisconsin Supreme Court.

Nor is the Wisconsin Supreme Court's opinion final in the second respect cited in *Market Street R. Co., supra.* The litigation involved in this case is to determine what penalty, if any, can reasonably be imposed upon the teachers for engaging in a strike under the factual circumstances existing at the time. The Wisconsin Supreme Court's opinion constituted an intermediate step which allows for continuation of the litigation before a lower judicial officer who will make a decision on the merits.

The petitioners suggest that *Local No. 438* v. *Curry,* 371 U.S. 542 (1963), supports appellate jurisdiction in this case. That reliance is misplaced.

In *Curry,* the issue raised was whether the Georgia courts had jurisdiction over a controversy said to be within the exclusive powers of the National Labor Relations Board. The Court stated:

> "The issue ripe for review is not whether a Georgia court has erroneously decided a matter of federal law in a case admittedly within its jurisdiction . . . nor is it the question of whether federal or state law governs a case properly before the Georgia courts. . . . What we do have here is a judgment of the Georgia court finally and erroneously asserting its jurisdiction to deal with a controversy which is beyond its power and instead is within the exclusive domain of the National Labor Relations Board." 371 U.S. at 548.

In the case at bar, the issue sought to be reviewed by the petitioners is whether a state court has erroneously decided a matter of federal law in a case *admittedly within the state court's jurisdiction.*

In *Curry,* this Court also reiterated two policy reasons for not finding finality in cases where it obviously does not exist as a procedural matter, such as in the case at bar. First, the Court reiterated the "policy of 28 U.S.C. §1257 against fragmenting and prolonging litigation and against piecemeal reviews of state court judgments". 371 U.S. at 550. Second, the Court pointed out that it was reluctant to find finality unless the intermediate decision effectively resolved the case, left no further defenses in the state proceedings for the petitioner, and for all practical purposes terminated the litigation.

The petitioners here are asking for piecemeal review of state court proceedings. The Wisconsin Supreme Court has done nothing more than direct that the respondents receive a fair hearing. The decision of the Circuit Court would have allowed termination of the respondents' employment without any meaningful hearing and without any fair and impartial determination of the facts. The petitioners will be entitled, upon remand to the Circuit Court, to present any appropriate evidence they desire and attempt to convince an impartial decisionmaker that, in view of the circumstances underlying this suit, the respondents should be disciplined and that the appropriate discipline is discharge. If such a finding is made there will be no reason for the petitioners to ever seek review from this Court. Thus the decision of the Wisconsin Supreme Court left defenses to the petitioners, does not terminate the litigation and does not resolve the case.

II. EVEN IF JURISDICTION EXISTS, THERE ARE NO SPECIAL AND IMPORTANT REASONS PRESENTED IN THIS CASE WHICH WOULD SUGGEST THAT REVIEW ON WRIT OF CERTIORARI IS THE APPROPRIATE EXERCISE OF JUDICIAL DISCRETION.

The principal consideration facing this Court in deciding whether to grant a petition for a writ of certiorari to a state court is whether "a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court." Rule 19.1(a), revised Rules of the Supreme Court of the United States.

In this case, the Wisconsin Supreme Court decided that as a matter of state law and the particular local circumstances involved with that application of state law, the respondents had a property interest in continued public employment with the petitioners and that the action taken by the petitioners threatened the respondents' liberty interests. The Court went on to hold that as a result of the interests involved, and the fact that the petitioners acted under color of law, due process of law was required.

The analysis of state laws and their effects on personal interests was a matter of state legislative interpretation by a state judicial body. The federal question involved and answered affirmatively in that portion of the opinion was whether, given the property and liberty interests found to arise by virtue of state law, due process was required. The federal question involved and so stated has been answered in the affirmative many times by this Court, and the resolution of the question made by the Wisconsin Supreme Court was clearly in accord with the applicable decisions of this Court. *Board of Regents* v. *Roth,* 408 U.S. 564 (1972); *Perry* v. *Sinderman,* 408 U.S. 593 (1972); *Morrissey* v. *Brewer,* 408 U.S. 471 (1972); *Wisconsin* v. *Constantineau,* 400 U.S. 433 (1971); and *Goldberg* v. *Kelly,* 397 U.S. 254 (1970).

Having determined that due process was required under the circumstances, the Court went on to hold that the members of the Board of Education, who were involved as adversaries with the teachers in the underlying collective bargaining negotiations, could not fairly sit as impartial decisionmakers with respect to imposing punishment for conduct resulting from the underlying adversary dispute. No novel federal question of substance was resolved by that decision nor did the resolution deviate from applicable decisions of this Court. There is little question that in situations where due process is required, one element of due process so required is an independent decisionmaker. *Gagnon* v. *Scarpelli,* 411 U.S. 778 (1973); *Morrissey* v. *Brewer, supra; Ward* v. *Monroeville,* 409 U.S. 57 (1972); *Pickering* v. *Board of Education,* 391 U.S. 563 (1968); *In Re Murchison,* 349 U.S. 133 (1955); and *Tumey* v. *Ohio,* 273 U.S. 510 (1927).

There can also be little doubt that the Board members were not impartial decisionmakers with respect to the discipline sought to be imposed against the teachers in this case. The Wisconsin Supreme Court found that by virtue of state law the Board members were required to engage in collective bargaining with the teachers. When the bargaining broke down and the teachers took action prohibited by statute, the Board, by attempting to decide on "appropriate" discipline for the teachers, was in a position to rule on discipline in a fashion which could also re-

solve the collective bargaining dispute in the Board's favor.

The Wisconsin Supreme Court held that discharge was not an automatic penalty for engaging in a prohibited strike and that the penalty to be imposed, if any, had to be appropriate to the circumstances. Because of the Board's adversary position with respect to the teachers and the underlying dispute, the Court held that the Board could not provide the required impartiality necessary to determine fairly the appropriateness of penalty.

Finding the Board members to be other than impartial decisionmakers under the circumstances is neither novel nor inconsistent with decisions of this Court. In *Pickering* v. *Board of Education, supra,* at 578 n. 2 this Court stated:

> "Appellant requests us to reverse the state court's decision upholding his dismissal on the independent ground that the procedure followed above deprived him of due process in that he was not afforded an impartial tribunal. However, appellant makes this contention for the first time in this court, not having raised it at any point in the state proceedings. Because of this, we decline to treat appellant's claim as an independent ground for our decision in this case. On the other hand, *we do not propose to blind ourselves to the obvious defects in the fact-finding process occasioned by the Board's multiple functioning vis-a-vis appellant.*" (Emphasis supplied).

Such multiple functioning as existed here was equally offensive in that the Board, while ostensibly attempting to impartially determine whether the teachers should be disciplined in any fashion for engaging in a strike, was always aware that it could alleviate its problems with respect to collective bargaining with the teachers by the convenient expedient of discharge.

The state court here made a finding based on its unique insights into local laws and local realities that the special facts and circumstances present in the case made the risk of unfairness intolerably high. *Withrow* v. *Larkin,* ..... U. S. ....., 43 U. S. L. W. 4459 at 4466. It would have been incompatible for the School Board on one hand to suggest that the breakdown in collective bargaining was caused solely by the teachers and then go on to find that the teachers need not be disciplined for engaging in a strike because the circumstances giving rise to the strike justified their conduct. If the Board did that, "it would . . . implicitly be admitting error in its prior finding". 43 U.S.L.W. at 4466. Forcing the Board to face the possibility of admitting error as a prerequisite to ruling in favor of the teachers does indeed create a risk of bias or prejudgment or "a sufficiently great possibility that the adjudicators would be so psychologically wedded to their complaints that they would consciously or unconsciously avoid the appearance of having erred or changed position." *Id.*

III. THE CASE OF ARNETT v. KENNEDY HAS NO APPLICATION TO THESE FACTS.

The petitioners argue that the Wisconsin Supreme Court somehow erred in applying established due process principles to the facts of this case. The petitioners urge that *Arnett* v. *Kennedy,* 416 U.S. 134 (1974), "should be directly controlling". Petition for Writ of Certiorari, p. 8.

Arnett simply has no application here. It is limited to cases involving federal civil servants whose employment is tied to the Lloyd-LaFollette Act. It has not been extended beyond that classification by this Court and it should

not be now. See *Goss* v. *Lopez,* ..... U.S. ....., 43 U.S.L.W. 4181 (1975).

The *Arnett* decision presents a format for statutory construction. This Court held with respect to the Lloyd-La-Follette Act that Congress had granted certain minimal due process rights where none were previously required and that, under these special circumstances, no more rights were required by the Constitution. There is no comparable history with respect to Wisconsin teachers, and the Wisconsin Supreme Court, applying *Wisconsin* statutory construction, held that the *Arnett* statutory construction rationale was not applicable. The United States Supreme Court must accept state construction of state statutes.

Finally, Justices Blackmun and Powell, while in the majority in *Arnett,* held in their separate opinion that there was no due process violation because a subsequent fair hearing was provided by the federal statutes. Prior to the decision of the Wisconsin Supreme Court, the teachers were not provided with any subsequent fair hearing. This decision now provides such a fair hearing and thus provides a procedure which is similar to the one provided in *Arnett.*

CONCLUSION

For the reasons stated above, as well as for the reasons stated in No. 74-1638, the Conditional Cross-Petition for Writ of Certiorari filed by the respondents herein, the respondents respectfully urge that the Petition for a Writ of Certiorari to the Supreme Court of Wisconsin be denied. In the event that said petition is granted, the respondents

ask that their Conditional Cross-Petition in No. 74-1638 be granted also so that all relevant issues in the case may be decided.

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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1606

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; BOARD OF EDUCATION OF HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; ROGER WEIHING, ROBERT HAUK, JEAN MEADS, FLOYD MEYER, MERLIN PLAMANN, VICTOR SCHROTH and RONALD SURPRISE, individually and as officers and members of the Board of Education of Hortonville Joint School District No. 1; and MARVIN OBRY, ROBERT KOHLS and GENE RIEDL, individually and as administrators of Hortonville Joint School District No. 1,

Petitioners,

v.

HORTONVILLE EDUCATION ASSOCIATION and MICHAEL WISNOSKI, ROSE MARIE OLSON, THOMAS NADEAU, JUDY MURPHY, RUSSEL LICHTE and RONALD HAMMOND,

Respondents.

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IN THE

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October Term, 1974

No. 74-1606

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HORTONVILLE EDUCATION ASSOCIATION and MICHAEL WISNOSKI, ROSE MARIE OLSON, THOMAS NADEAU, JUDY MURPHY, RUSSEL LICHTE and RONALD HAMMOND,

Respondents.

PETITIONER'S REPLY BRIEF

I.

THE PETITION PRESENTS A SUBSTANTIAL, UNRESOLVED FEDERAL QUESTION

Respondents assert that no substantial federal question is presented by the petition, yet respondents did not even discuss the decisions by the highest courts of other states and by the federal circuit courts which are in conflict with the decision below.[1]

Also, contrary to respondents' contentions, none of this Court's prior decisions suggests or holds that the government employer charged by law with making employment decisions is constitutionally prohibited from dismissing striking employees merely because it also has collective bargaining responsibilities. The interests to be balanced in a criminal prosecution are not synonymous with those required in civil cases.

The Seventh Circuit, affirming a decision of the Western District of Wisconsin, so held in *Suckle v. Madison General Hospital*, 499 F.2d 1364, 1366 (7th Cir. 1974):

> "We agree with Judge Doyle that lodging the decision-making function in the medical staff was constitutionally permissible. As he stated:
>
> > 'Implicit in this conclusion is the proposition that the Fourteenth Amendment is not automatically offended despite the realistic possibility, even probability, that among the members of the medical staff there are some who harbor resentment or jealousy, and others who have formed personal evaluations in the court of experience over the

[1]In addition to the cases cited at pages 11-12 of the Petition for Certiorari, the decision below is also in conflict with *Federation of Teachers v. Community College*, Nos. 74-2323 and 2324, (6th Cir. July 2, 1975), unofficially reported at 89 L.R.R.M. 2865.

> years with the physician in question. Indeed, there may well be some members of the staff who have not been free of advance impressions, whether accurate or distorted, with respect to the merits of the controversy, but in my view, this circumstance should not automatically bar them from participation in the decision-making process. I do not believe that the constitution requires the decision-making process to be as antiseptic in this context as it is required to be, for example, in a criminal prosecution.' 362 F.Supp. at 1209-1210."

The decision below affects not only all government employees in Wisconsin but has an impact on most, if not all, states and the federal government. Public employee strikes are not confined to the small community of Hortonville, Wisconsin.

Collective bargaining in the public sector is a system consciously designed to enhance the local government's ability to respond to the needs of its constituency and its employees. Each government entity must decide how to respond to a strike and how to perform its functions in strike situations. The ability to make any such necessary policy decisions is unclear until this decision is reviewed.

Legislatures which may wish to adopt, amend or repeal statutes covering collective bargaining and public employee strikes also need to know what, if any, constitutional limitation there is on the right of a public employer to make a policy decision that involves terminating and replacing strikers.

II.

THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT

The pendency of some type of further state proceedings does not mean that the judgment below is not final under 28 U.S.C. §1257(3). *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 246 (1975); *North Dakota State Pharmacy Bd. v. Snyder's Drug Stores*, 414 U.S. 156 (1974); *Hudson Dist., Inc. v. Eli Lilly & Co.*, 377 U.S. 386 (1964).

Particularly where the further state court proceedings are separate in form, this Court has held judgments final. E. g., *Madruga v. Superior Court*, 346 U.S. 556 (1954); *Rescue Army v. Municipal Court*, 331 U.S. 549, 565-68 (1947). The pending state court proceedings referred to by Respondents are collateral to this litigation. Upon holding that the elected school board was a constitutionally deficient decision maker, the Wisconsin Supreme Court legislated a new proceeding. That proceeding is to be commenced by *petition* "in any court of record in the country where the school district . . . is located." (p. Ap. 29* 66 Wis.2d at 498.)

To allow Respondents to use the newly created right, the court below authorized amended pleadings before the trial court. That Respondents chose to commence a proceeding to enforce the right created by the Wisconsin Supreme Court does not affect the finality of the judgment.[2] Such enforcement proceedings are irrelevant to the question of finality under 28 U.S.C. §1257. *LaCrosse Telephone Corp. v. Wisconsin Employment Relations Board*, 336 U.S. 18, 21 (1949). *Allegheny Ludlum Steel Corp. v. Kelly*, 330 U.S. 767 (1947).

*References are to the Wisconsin Supreme Court's opinion. Pagination is to the appendix to the Petition For A Writ Of Certiorari.

[2]The characterization of the judgment below as a denial of summary judgment does not determine this Court's jurisdiction. Had Respondents rather than Petitioners sought summary judgment the result below would have been the same: Respondents would have won only the right to commence a new proceeding. Petitioners would be seeking review of a judgment of the highest court of Wisconsin *entered against* them. This Court's appellate jurisdiction does not hinge on such labels. *Pope v. Atlantic Coast Line R. Co.*, 345 U.S. 379, 382 (1953); *Dept. of Banking v. Pink*, 317 U.S. 264, 268 (1942).

Respondents' position is that the state trial court is to substitute its judgment for that of the school board. The question ripe for review by this Court is *who* is constitutionally entitled to make certain policy decisions. That question is separate and independent of the factual and legal issues involved in determining *what* was the proper response to the strike and is final for the purposes of 28 U.S.C. §1257. See *American Radio Assn. v. Mobile S.S. Assn.*, 419 U.S. 215, 217 (1974); *Local No. 438 v. Curry*, 371 U.S. 542 (1963).

Nor does review at this time offend federal/state relationships. This Court is not being asked to review any matter which the Wisconsin Supreme Court has not considered. No facts to be adduced at the new proceeding will affect the due process issue or the equal protection claim which Respondents seek to have reviewed in No. 1638. Decisions on controlling questions of law, anterior to and separate from the merits are final under 28 U.S.C. §1257. *Miami Herald Publishing Co. v. Tornillo, supra; Harris v. Washington*, 404 U.S. 55 (1971); *Organization For A Better Austin v. Keefe*, 402 U.S. 415, 418 (1971).

The Court below itself recognized that efforts to have this Court review the judgment are appropriate now, and granted a ninety day stay to allow the Petition to be filed.[3]

[3]In declining to continue the stay the Wisconsin Supreme Court appears to have read 28 U.S.C. § 2101 (f) as depriving it of jurisdiction upon the docketing of a Petition for Certiorari.

Further, the question of whether the school board was a constitutionally permissible decisionmaker may be lost in the new proceeding, and will certainly be lost if Petitioners prevail at trial. To preserve that issue Petitioners may have to attempt to ignore the Wisconsin Supreme Court decision and attempts to plead that the trial court lacks subject matter jurisdiction. This Court has avoided placing a petitioner in the position of having to defy the supreme court of its state, in applying 28 U.S.C. §1257. *North Dakota State Pharmacy Bd. v. Snyder's Drug Stores, supra. Cf., Richardson v. Ramirez,* 418 U.S. 24, 35 (1975). Finally, if the trial court's jurisdiction to proceed is raised, a later appeal could be affirmed on state grounds because of the nature of the proceeding created by the Wisconsin Supreme Court. In that event, review of the federal question by this Court would be lost.

III.

THE DECISION BELOW RESTS ENTIRELY ON THE FOURTEENTH AMENDMENT

In opposing the Petition For A Writ Of Certiorari, Respondents have *not* contended that the decision below rests on state grounds. However, in declining to extend the stay granted below, Mr. Justice Rehnquist suggested that there may be some doubt as to whether the judgment rested solely on a construction of the Fourteenth Amendment. No. A-133 (74-1606) Aug. 18, 1975 (Mr. Justice Rehnquist in chambers).

The state constitution[4] was not argued before the trial

[4]Article I of the Wisconsin Constitution was referred to in the original pleadings. (p. Ap. 6, 54, 66 Wis.2d at 477.) Article I contains twenty-four sections covering, *inter alia,* free speech, prohibitions on slavery,

court (p. Ap. 57-69) or the Wisconsin Supreme Court. (p. Ap. 16-25, 66 Wis.2d at 487-94.) In fact the Wisconsin Supreme Court prefaces its entire discussion of the due process issue with only a reference to the Fourteenth Amendment. (p. Ap. 1617, 66 Wis.2d at 487.) No reference was made to Art. I of the Wisconsin Constitution or to a prior decision construing that article[5] any place in that discussion. Only this Court's opinions and the opinions of lower federal courts construing the Fourteenth Amendment are cited by the Wisconsin Supreme Court.

Even assuming, *arguendo,* that the Wisconsin Supreme Court could have reached the same result by applying some section of Art. I of the Wisconsin Constitution,[6] this case is nonetheless properly before this Court for review. *Indiana ex rel Anderson v. Brand,* 303 U.S. 95 (1938).

---

bail requirements, property rights for aliens, treason, imprisonment for debt and the use of school buildings. What section of Art. I Respondents originally thought were violated was not disclosed to the courts below or petitioners.

[5]The Wisconsin Supreme Court did cite *General Electric Co. v. W.E.R.B.,* 3 Wis.2d 227, 241, 88 N.W.2d 691 (1958) and *Durkin v. Board of Police and Fire Comm.,* 48 Wis.2d 112, 122, 180 N.W.2d 1 (1970). The state constitution was not raised in either case. In *General Electric* this Court's decisions under the Fourteenth Amendment were used by analogy to construe the state administrative procedure act, which is not involved here. In *Durkin* the court cited *General Electric* for the proposition that an administrative body was required to notify an individual of the charges against him.

[6]The Wisconsin Supreme Court has compared Art. 1, sec. 1 of the Wisconsin Constitution to this Court's decisions under the Fourteenth Amendment in a substantive due process, but not a procedural due process context. E.g., *Chicago & N.W. Ry. v. LaFollette,* 43 Wis.2d 631, 642-43, 169 N.W.2d 441, 445-46 (1969).

Also, Wisconsin's "Magna Carta" provision, Art. I, sec. 9, under which the court created the new proceeding, is not applicable until *after* a legal right is established. See, *Ross v. Ebert,* 275 Wis. 573, 82 N.W.2d 315 (1956); *Scholberg v. Itnyre,* 264 Wis. 211, 58 N.W.2d 698 (1952). Not until the Wisconsin Supreme Court invalidated the school board's role as decisionmaker did it turn to Art. 1, sec. 9.

CONCLUSION

For the reasons stated above and in the Petition for a Writ of Certiorari, Petitioners respectfully urge this Court to issue a Writ of Certiorari to the Wisconsin Supreme Court.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1974

No. 74-1606

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; BOARD OF EDUCATION OF HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; ROGER WEIHING, ROBERT HAUK, JEAN MEADS, FLOYD MEYER, MERLIN PLAMANN, VICTOR SCHROTH and RONALD SURPRISE, individually and as officers and members of the Board of Education of Hortonville Joint School District No. 1; and MARVIN OBRY, ROBERT KOHLS and GENE RIEDL, individually and as administrators of Hortonville Joint School District No. 1,

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RESPONDENTS.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

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RESPONDENTS.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Wisconsin Supreme Court (A. 230-268) is reported officially at 66 Wis. 2d 469, and unofficially at 225 N.W.2d 658 and 88 L.R.R.M. 3075. The Wisconsin Circuit Court's opinion granting the School Board's motion for summary judgment (A. 172) is not officially

reported; unofficially, it is reported at 88 L.R.R.M. 2743. The Circuit Court's decision denying the plaintiff Association's motion for a temporary restraining order (A. 119) is not reported.

JURISDICTION

The judgment of the Wisconsin Supreme Court was entered February 5, 1975. An order denying rehearings was issued March 28, 1975. (A. 284) The petition for a writ of certiorari was filed on June 19, 1975. This Court's jurisdiction is invoked under 28 U.S.C. § 1257 (3). The petition for a writ of certiorari was granted on October 6, 1975.

QUESTION PRESENTED

Whether elected members of a public school board, who have the exclusive authority under state law to terminate teachers engaged in an illegal strike, are prohibited by the due process clause of the Federal Constitution from so doing because they are not sufficiently impartial decision makers.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 1 of Article XIV of the Amendments to the Constitution of the United States provides as follows:

> ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

1 Wis. Stat. § 118.22 (2), p. 2284 (1973) provides:

> "No teacher may be employed or dismissed except by a majority vote of the full membership of the board."

1 Wis. Stat. § 111.70 (4)(l), p. 2206 (1973) provides

> *"Strikes prohibited.* Nothing contained in this subchapter shall constitue a grant of the right to strike by any county or municipal employe and such strikes are hereby expressly prohibited."

STATEMENT OF THE CASE

Petitioners are a Wisconsin common school district, the School Board, its elected part-time members and its agents. The Hortonville School District serves a rural community of 8,500 persons. Its teaching employees have been represented by respondent Hortonville Education Association, an affiliate of the largest statewide teachers labor union, and of the National Education Association.

On March 18, 1974 the teaching employees of the district went on strike over the terms of a 1974-1975 collective bargaining agreement which would take effect in the fall of 1974. (A. 150-51, 231) Except for two days during which the School Board attempted to operate the schools with substitutes, the strike closed the schools. (A. 152, 232)

On March 20 and March 23, 1974, the school superintendent, by letter and at the direction of the School Board, invited the striking teachers to return to work. (A. 151-52, 231-32) Several teachers did return to work after the first letter, but none returned after the second letter. (A. 151-52, 231-32) On March 29, 1974 the School Board decided to schedule hearings to determine whether the teachers were

in fact striking as charged by the superintendent. (A. 152, 232) Individual hearings were planned pursuant to notices sent to each teacher stating that the teacher was charged with striking in violation of law and contract and that, if these charges were true, termination of his or her employment contract could result. (A. 153, 232)

Individual hearings were not held because the teachers chose to stand as a group and refused to answer questions from the Board or its counsel. The hearings therefore became a group hearing. (A. 233) Counsel for the teachers stated:

> "We have already indicated everybody got the same form and they are all charged with the same thing. They have consulted and conferred among themselves and concurred that they have done or not done the same things, all of which would be within the knowledge of management . . . ." (A. 86, 198)

Though aware that refusal to answer questions could result in the Board finding that they were in fact on strike, counsel for the Association asserted only that the Board could not infer from such refusal that the strike was illegal or a breach of contract. (A. 88-89, 199) Counsel for the Association stated that the proper course was to substitute further collective bargaining for the hearings. (A. 97) Counsel for the Association also objected to the Board acting as decisionmaker because of its:

> ". . . involvement as to management of this School District and its involvement in the labor dispute which is the basis for the board's consideration, but hard [sic] for a neutral tribunal and some disinterested third party. It seems to me it is no more fair that you should sit in judgment of the employees and [sic] the

> employees should be challenged to have violated your office by conduct in labor matters. What we have to have is a third party and I would like an answer to that." (A. 91)

In response, counsel for the Board reminded counsel for the Association of the availability of other forums. The teachers' counsel's response was:

> "As far as appropriate forms going out, as I said before, we objected to this proceeding, but beyond that it isn't going to do us any good, nor you, if we go to Employment Relations Commission with complaints that you have been bargaining in bad faith or we have been bargaining in bad faith. It isn't going to do you any good to have hearings or things we have done today. We can all stand and say we are people of principle and I am standing on my rights, and these people too, or you people may be doing. We must settle, and to do that you have to sit at the table and bargain, and we could do it in half the time you have already scheduled for whatever those things are with your employees. That's the only way you're going to settle it." (A. 97)

The hearing proceeded. Counsel for the Association, preserving the objection to the School Board conducting the hearing and repeating the argument that the Board should substitute bargaining, made an offer of proof relating primarily to prior bargaining between the parties, but did not deny the teachers were striking. (A. 94-96, 197) The Board rejected the offer of proof on grounds of materiality. (A. 96)

After the hearings closed, the Board adopted a resolution finding the teachers to be illegally striking. The resolution also terminated the employment contracts of the teach-

ers and directed the hiring of replacement teachers from within and without the district. (A. 116-17) The termination notice sent each teacher specifically stated that replacement teachers were being sought and advised that the teacher could apply for any vacancy. (A. 41) Only one striking teacher sought such employment, and was employed. (A. 160, 234) The schools, staffed with replacements, reopened on April 8, 1974. (A. 160, 192, 234)

On April 4, 1974 the Association and six of the teachers on behalf of the class of teachers began this action by serving a summons, order to show cause, complaint and supporting affidavits. (A. 6-37) The order to show cause was, in effect, a motion for a temporary injunction. It asked that the School Board be enjoined from hiring replacments. (A. 6) It did not ask that the teachers be reinstated. The complaint asked that the discharges be set aside, and declared null and void, but did not ask for reinstatement. (A. 13-14, 235) The complaint also asked that the School Board be enjoined from hiring replacements until such time as the teachers had been afforded a "full and fair hearing." (A. 14)

On April 11, 1974 the Wisconsin Circuit Court denied the Association's request for a temporary restraining order on the grounds that the teachers were on strike in violation of Wisconsin law and were suffering no irreparable harm due to the self-incurred economic loss attendant to a continuing strike. (A. 125-26) The Circuit Court's opinion specifically noted that the teachers were still on strike on April 11, 1974, seven days after the terminations. (A. 126)

On July 19, 1974, the circuit court granted the Board's motion for summary judgment on all issues involving the federal due process claim. (A. 172-203) Plaintiff Associa-

tion then petitioned the Wisconsin Supreme Court for leave to commence an original action raising for the first time certain federal constitutional claims. (A. 216) Leave was denied, but the Wisconsin Supreme Court ordered that any appeal of the Circuit Court's decision be expedited, and set a briefing schedule. (A. 227)

On appeal the Wisconsin Supreme Court explicitly resolved all state law questions in the School Board's favor, including the decision that:

> "From the statutes, the cases cited, and the contract, we conclude the school board did have the power to discharge the teachers who engaged in the prohibited strike." 66 Wis.2d at 481, 225 N.W.2d at 664-65 (A. 239).

The court then considered both the claims appealed and those sought to be raised in the petition for leave to commence an original action. 66 Wis.2d at 479, 225 N.W.2d at 663 (A. 236). Wisconsin's prohibition of public employee strikes was sustained against an equal protection claim. 66 Wis.2d at 487, 225 N.W.2d at 667 (A. 245).

Turning to respondent's federal due process claims the Wisconsin Court defined the issue narrowly: ". . . the appellants allege their constitutional inadequacy in only one respect, *i.e.*, the lack of an impartial decision maker." 66 Wis.2d at 491, 225 N.W.2d at 670 (A. 250).

After finding that constitutionally protected interests in property and liberty were implicated under its reading of *Board of Regents v. Roth*, 408 U.S. 564 (1972), a majority of the Wisconsin Supreme Court held that respondents were denied due process under the Fourteenth Amendment.

Relying on *Morrissey v. Brewer*, 408 U.S. 471 (1972), the court concluded that it was essential: ". . . even in cases of undisputed or stipulated facts, that an impartial decision-maker be charged with the responsibility of determining what action shall be taken on the basis of those facts." 66 Wis.2d at 493, 225 N.W.2d at 671 (A. 252).

The court stated, "This is not to suggest, of course, that the board members were anything but dedicated public servants, trying to provide the district with quality education while still keeping within its limited buget." 66 Wis.2d at 494, 225 N.W.2d at 671 (A. 253). There was no allegation or finding of a personal or pecuniary bias on the part of the members of the school board.

Despite the absence of an allegation or finding of a specific bias, despite the fact that the state statute (Wis. Stat. 118.22(2) (1973)) required that only the elected School Board could make the decision to discharge, and soley because the School Board was bargaining and was required by statute to bargain with the Association which represented the striking employees, the Wisconsin Court held that: ". . . the board was not an impartial decisionmaker in a constitutional sense. . . ." 66 Wis.2d at 494, 225 N.W.2d at 671 (A. 253).

The court's decision was limited to this federal procedural issue and did not hold that plaintiffs were unreasonably discharged.

The court said the available review of the School Board's decision would not "provide for review to determine whether another course of action such as mediation, injunction, continued collective bargaining or arbitration would have been a more reasonable response on the part of the decisionmaker." 66 Wis.2d at 496, 225 N.W.2d at

672 (A. 255). The court then directed that the discharged teachers could bring an action for *de novo* review of the Board's decision. 66 Wis.2d at 498, 225 N.W.2d at 673 (A. 257).

Both parties moved for rehearing. Both motions were denied. (A. 284)

After the Wisconsin Supreme Court denied the motions for rehearing, the teachers filed an action in the Federal District Court for the Eastern District of Wisconsin, seeking immediate reinstatement. The complaint affirmatively alleged that plaintiffs were striking in April of 1974. This case was dismissed upon the ground the teachers had presented their federal constitutional claims in state court, and could not re-litigate those claims in federal court. *Wisnoski v. Weihing*, 396 F.Supp. 1358 (E. D. Wis. 1975).

On August 14, 1975, respondents filed a petition for a *de novo* hearing in the Wisconsin Circuit Court. (Petition For De Novo Hearing) On October 6, 1975, this Court granted the School Board's Writ of Certiorari to the Wisconsin Supreme Court. The *de novo* hearing was stayed pending this Court's decision, by consent of the parties. (A. 328-30)

SUMMARY OF ARGUMENT

The plaintiff teachers were held to have been illegally striking, and such strikes were held to be a valid cause for discharge, under Wisconsin law as confirmed in this case.

The School Board had invited the teachers to stop striking; when they did not, the School Board afforded a record hearing, at which the teachers did not deny they were striking. The School Board discharged the teachers, and reopened the school with replacements. Although the striking teachers were invited to apply for employment, they did not, but remained on strike after commencing this action.

The Wisconsin Supreme Court held that federal due process prohibited the School Board from acting to discharge the teachers, solely because the School Board was also collectively bargaining with the teacher's union.

Wisconsin statutes require the School Board to operate schools, be responsible to the district electorate, and bargain with the teacher's union. The statutes also require that only the School Board can employ and terminate teachers.

The decision below effectively denies the electorate of a voice in its own affairs. The School Board is expected to be responsive to the electorate in deciding how to operate the school and allocate available revenue. The teachers have the right in Wisconsin to bargain about the effects of those decisions on employment, but in Wisconsin the bargaining process is not supposed to be affected by the cessation of educational services and political pressure upon the electorate and the School Board, which a strike causes.

The Wisconsin Supreme Court stated that the decision of what to do about the closed schools had to be made quick-

ly, and that the School Board had a duty to open and staff the schools, under state law.

The Wisconsin decision produces the result that the federal due process clause effectively prohibits the School Board from implementing its duty to open and staff schools, and has the effect of making illegal public employee strikes better protected than legal private employee strikes. A school board will not risk exercising its discretion, where *de novo* review of its exercise of discretion could result in paying two sets of teachers.

Where teachers are striking, do not stop striking even after notice of a hearing to determine the fact, and admit they are striking, they should be considered to have abandoned any property for purposes of considering whether further procedural process is constitutionally required.

The decision below interprets the federal due process clause in a manner which could inhibit states from granting employee property rights. Only by refraining from granting property can the Hortonville decision be avoided. The Wisconsin decision encourages employees to emphasize adversary aspects of the employer-employee relationship.

The bare presence of two functions vis a vis an employee does not disqualify a government agency from exercising substantively lawful discretion. This Court has been reluctant to limit government discretion, particularly in education.

No risk of an inaccurate determination of the fact of striking is present here, since the School Board had an interest in finding teachers who were not striking, and since the plaintiffs have admitted they were striking.

Morrissey v. Brewer, 408 U.S. 471 (1972) did not limit the ability of a government agency to exercise discretion where the facts are not disputed.

There is no suggestion or finding that the School Board had any personal bias, nor that they were acting otherwise than as dedicated public servants. Under *Withrow v. Larkin*, 421 U.S. 35 (1975) the School Board was therefore not disqualified.

Under pre-existing state law, the plaintiff teachers had the right to pursue review which would determine whether the discharges were substantively lawful, factually supportable, cause for discharge, and not colored by anti-union motivation. The teachers did not pursue any of these remedies.

The striking teachers had no property interest which would require that they be afforded a different decisionmaker. Plaintiffs could have avoided any loss of property simply by terminating their strike.

The allocation of bargaining and discharge decisions to an elected School Board is an intelligent grouping of legislative functions, working well. It should not be struck down by a *per se* challenge.

ARGUMENT

Wisconsin law provides that strikes by public school teachers are illegal, that striking is cause for discharge, and that only the School Board can discharge teachers for striking. In 1974, the Hortonville, Wisconsin, schools were closed because the teachers had elected to strike in order to force the employing School Board to accede to the demands of the teachers Association in the collective bargaining then in progress.

The School Board twice invited the teachers to stop striking and return to work. Each teacher was then notified that the school superintendent had informed the Board

the teacher was believed to be striking, and that a hearing would be held to determine if the charge was true. Record hearings were held at which the teachers were represented by counsel; the teachers did not contest the fact of a strike, but argued the School Board could not make the decision to discharge them.

The School Board terminated the teachers and hired replacements, and school resumed. In the termination notices the teachers were invited to apply for employment. Only one did so, and was rehired.

The Wisconsin Supreme Court held that the School Board could not discharge the teachers because it was not a sufficiently impartial decisionmaker under the Federal Constitution. Because under state law only the School Board could discharge teachers, the Wisconsin Supreme Court held that due process required that a state trial court determine *de novo* whether discharge was the most reasonable course of action for the School Board to have chosen.

The School Board terminated the teachers in order to hire replacements. The striking teachers were then under one year contracts. Three days before the strike they had been offered renewal contracts as required by Wis. Stat. § 118.22(2) (1973). The question whether to hire replacement teachers could not be divorced from the question whether to discharge the striking teachers. Under the Wisconsin Supreme Court decision no School Board can effectively exercise its right under state law to discharge teachers and operate the school with replacements because of the risk that it would end up with term contracts for two sets of teachers, and possible monetary liability for both staffs. See Wis. Stats. 118.22(2) (1973).

I. WISCONSIN STATUTES REQUIRE THAT SCHOOL DISTRICTS BE OPERATED THROUGH A SCHOOL BOARD IN ORDER TO IMPLEMENT THE VIEWS OF THE DISTRICT ELECTORATE; THE DECISION BELOW EFFECTIVELY DENIES THE ELECTORATE ITS POLICY VOICE.

A. The School Board Must Under Wisconsin Law Manage The School District Affairs, Hire And Fire Teachers, And Bargain With Unions Representing Its Teachers.

The Hortonville School District is a Wisconsin common school district. It is a fiscally independent government unit deriving revenue from taxes levied on the property of citizens in the district in addition to statutory state school aid. Wis. Stat. §§ 120.10, 120.12(3)(a) (1973). Annually, the School Board prepares a budget and presents it for approval to the electorate at the annual meeting. Wis. Stat. § 120.11 (3) (1973). If the annual meeting results in an insufficient levy, the School Board, within statutory limits, may levy additional amounts. Wis. Stat. § 120.12(3)(a) (1973).

The district is operated by the School Board which is responsible for the "possession, care, control and management of the property and affairs of the school district", subject only to direct electoral control at the annual meeting and to the authority specifically vested in other district officers. Wis. Stat. §§ 120.11(1), (2) (1973). The members of the School Board are elected by district voters. Wis. Stat. §120.03 (1973). By statute the School Board is the only body empowered to hire and fire teachers. Wis. Stat. § 118.22(2) (1973); 66 Wis.2d at 497, 225 N.W.2d at 673 (A. 256) Under Wis. Stat. § 118.22(2) (1973) teachers are employed on a year to year individual contract basis.

Wisconsin also has a comprehensive public employee labor relations statute called the Municipal Employment Relations Act, or MERA. Wis. Stat. § 111.70 *et. seq.* (1973). Public employers in Wisconsin, through their representatives and agents, are required to collectively bargain with the representatives of their employees. Wis. Stat. § 111.70(3)(a)4 (1973). Under MERA, the Hortonville School Board was required to meet and confer in good faith at reasonable times regarding wages, hours and conditions of employment with the Hortonville Education Association. However, neither the employer nor the union is compelled to agree to a proposal or make a concession. Wis. Stat. § 111.70(1)(d) (1973).

B. The Decision Below Effectively Denies The District's Electorate Of A Voice In Its Own Affairs.

The case arises from a public sector labor dispute. Public sector collective bargaining is predominantly a political process in which the interests of opposing groups are resolved in part through bargaining. See, Summers, *Public Employee Bargaining. A Political Perspective*, 83 Yale L. J. 1156 (1974); Shaw and Clark, *The Practical Differences Between Public And Private Sector Collective Bargaining*, 19 U.C.L.A. L. Rev. 867 (1972). In bargaining, like all other matters, the individual School Board member is expected to be responsive to his or her constituency. On some issues the teachers' interests will be adverse to those of the electorate. Teachers, for example, may favor allocating more revenue to salaries than other services or may desire a larger budget with a consequent increased tax levy. Naturally, some taxpayers and citizens may hold opposite views. The School Board, which is controlled by the ballot

box, is responsible, like thousands of other local government legislative bodies, for compromising the competing interests. However, in Wisconsin, the legislature has declared that compromise may not be influenced or controlled by the political and economic dislocations stemming from the interruption of important public services due to a strike.

Under Wisconsin law, both public sector collective bargaining and the concept of locally controlled school districts presuppose that the district electorate will have an effective voice in the decisions that determine the tax rate, quality of education and operation of schools. However, the electorate can further its interests only if its elected representative can effectively make the necessary decisions.

All of the possible responses to the illegal strike affect the interests of the district's electorate. Continuation of bargaining, with or without mediation or fact-finding (but with closed schools), arbitration, possible injunctive relief,[1] and discharge coupled with the hiring of replacements are inseparable from considerations of the size and allocation of tax revenues, the quality of education and the speedy resumption of classes.

An adjudicatory procedure before a judge or administrative body cannot adequately respond to the views of thousands of people who are affected by the strike. The ballot box is their only meaningful opportunity to be heard. *Cf. Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441 (1915). Since the School Board's determination of how to respond to the strike is not entitled to any deference in the *de novo* hearing mandated by the Wisconsin decision, the citizens of the Hortonville School

[1]Public employees have continued to strike, or begun another strike, despite an injunction. *See Rockwell v. Board of Education*, 393 Mich. 616, 635, 227 N.W.2d 736, 744 (1975), *appeal docketed*, 44 U.S.L.W. 3207 (U.S. No. 75-466).

District have lost their right to be effectively heard, and the balance struck by the state legislature has been materially altered by this application of the Federal Constitution. Compare *Wood v. Strickland*, 420 U.S. 308 (1975).

II. THE DECISION TO REOPEN THE PUBLIC SCHOOLS BY DISCHARGING THE STRIKING TEACHERS HAD TO BE EFFECTIVELY IMPLEMENTED AT THE TIME OF THE STRIKE.

Because education was at a standstill, the School Board had to select a course of action. Because the conduct was continuing, the action selected had to be selected and implemented in April, 1974, not later. The School Board was not then seeking to cope with past conduct. "When the teachers went on strike, the School Board was undoubtedly faced with a situation that needed immediate attention. Clearly, it had a duty to keep the schools open and staff them with competent teachers." 66 Wis.2d at 496, 225 N.W.2d at 672 (A. 255).

The Wisconsin Supreme Court thus not only decided the School Board had the right to discharge the teachers under state law, but indicated the Board may have the duty to discharge if the result is the reopening of the schools. 66 Wis.2d at 481, 496-97, 225 N.W.2d at 664-65, 672 (A. 239, 255-56). See *Curkeet v. Joint School District*, 159 Wis. 149, 149 N.W. 708 (1914).

In Wisconsin there is an additional need for speed because the School District must provide school for a minimum number of statutory days before June 30 to remain eligible for state monetary school aid. Wis. Stat. §§ 121.02 (1)(h), 121.17(2)(a), 115.01(6) (1973).

Other courts have recognized that public employee strikes require prompt response by the government. *Bulloch*

v. Mumford, 509 F.2d 384 (D.C. Cir. 1974), *reh. en banc den.*, 509 F.2d 388 (1975); *Collins v. Rockefeller*, 35 N.Y. 2d 547, 324 N.E.2d 113 (1974), *appeal dismissed sub nom, Collins v. Carey*, 43 U.S.L.W. 3613 (1975); *Simard v. Board of Education*, 473 F.2d 988 (2d Cir. 1973).

In *Rockwell v. Board of Education*, 393 Mich. 616, 635, 227 N.W.2d 736, 744 (1975), *appeal docketed*, 44 U.S.L.W. 3207 (U.S. No. 75-466) the court said the "hiring of replacements often cannot await time consuming adjudicatory processes." *Compare Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), in which the Court declined to allow procedural due process to frustrate Puerto Rico's legitimate interests in controlling the use of a yacht in criminal activities by summary seizure.

The Wisconsin application of the Federal Constitution unnecessarily and materially interfered with the governmental need to reopen its schools by acting quickly.

III. THE DECISION BELOW WOULD MAKE ILLEGAL PUBLIC EMPLOYEE STRIKES BETTER PROTECTED THAN PRIVATE SECTOR STRIKES WHICH ARE LAWFUL.

Wisconsin prohibits public employee strikes. That prohibition is a recognition that the public employer is to continue its government function,[2] in this case education.[3] Even

[2]In granting public employees collective bargaining rights the Wisconsin legislature stated: "In creating this subchapter the legislature recognizes that the public employer must exercise its powers and responsibilities to act for the government and good order of the municipality, its commercial benefit and the health, safety and welfare of the public to assure orderly operations and functions within its jurisdiction, subject to those rights secured to public employes by the constitutions of this state and of the United States and by this subchapter." Wis. Stat. § 111.70(1)(d) (1973).

[3]"[E]ducation is perhaps the most important function of state and local governments." *Brown v. Board of Education*, 346 U.S. 483, 493 (1954). The significance of providing educational services (see *Goss v. Lopez*, 419 U.S. 565 (1975)) is not diminished merely because the teachers, by engaging in illegal conduct, choose to interrupt it for their own economic interests.

though public employees have been granted bargaining rights, public employees may constitutionally be denied the right to strike. *United Federation Of Postal Workers v. Blount*, 325 F.Supp. 879 (D.D.C.), *aff'd.*, 404 U.S. 802 (1971).

Despite Wisconsin's obvious interest in not having its public policy defeated by a due process holding that encourages public employees to strike, the effect of this decision is that the employer's ability to respond effectively to a strike is impaired. The employees are thereby insulated by the federal due process clause from the state's prohibition against strikes. This result vitiates *Blount*.

The private sector labor relations rules illustrate how Wisconsin's public sector collective bargaining scheme is frustrated by the Wisconsin Court's decision. Under the National Labor Relations Act, 61 Stat. 136 (1947) *et seq.*, 29 U.S.C. § 151 *et seq.* some strikes are protected. Although the employee is protected against employer discrimination for engaging in a strike, the NLRA allows the economic striker to be permanently replaced. *N.L.R.B. v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938). The only interest served by permanent replacement of a nonpublic employee is the employer's interest in continuing its business.

Under the National Labor Relations Act, 29 U.S.C. § 158(d), an employee who strikes during the statutory "cooling off" period ceases to be an employee. This concept of abandonment of rights for NLRA purposes is designed to assure the parties of a bargaining atmosphere free from the tensions and problems associated with a strike.

Society's interests in allowing a private employer to operate during a *lawful* strike are not greater than society's in-

terest in the government's ability to function during an *unlawful* strike. The public employer must be able to replace employees in order to fulfill its duty to operate the schools.

Under the Wisconsin Supreme Court's application of the Federal Constitution, if teachers strike, they can effectively accomplish collateral objects by closing the schools, since the employer cannot implement a lawful response to the economic and political pressure that results from closed schools.

The procedures which were afforded the Hortonville teachers by the School Board in this case were not only consistent with but went well beyond anything mandated by statute. In Wisconsin, the same statute which requires the Board to grant a property interest (an annual contract) provides that only the Board can take it away. Wis. Stat. § 118.22(2) (1973). Procedurally, state statutes require only that "[n]o teacher may be employed or dismissed except by a majority vote of the full membership of the board." Wis. Stat. § 118.22(2) (1973). Accordingly, respondents cannot have been unconstitutionally deprived of any property interest conferred by that statute. Compare the opinion of Mr. Justice Rehnquist in *Arnett v. Kennedy*, 416 U.S. 134 (1974).

Where, as here, the teachers have been notified they are considered to be striking, and do not contest the fact even at a record hearing, they should be considered to have abandoned any property for Federal due process purposes. *Farrelly v. Timberlane Regional School District*, 114 N.H. 564, 324 A.2d 723 (1974).

IV. FEDERAL DUE PROCESS SHOULD ALLOW STATES TO GRANT PROPERTY RIGHTS AND EMPLOYEE BARGAINING RIGHTS AS THEY WISH; THE EFFECT OF THE WISCONSIN DECISION IS TO INHIBIT THE LEGISLATIVE GRANTING OF RIGHTS.

State employee property rights are created by state law. *Board of Regents v. Roth*, 408 U.S. 546 (1972). Legislatures have also granted employees bargaining rights. Deciding in this case that the striking employees had abandoned their property would not prevent legislatures from creating any substantive or procedural right, including even the right to strike. Nor would such a decision prevent government employers from re-hiring strikers on any terms agreed upon. See, *National Education Association v. Lee County Board of Public Instruction*, 260 So.2d 206 (Fla., 1972).

By contrast, the Wisconsin decision requires legislatures either to vest policy choices in an agency which does not have responsibility to the electorate or the government involved, or requires legislators to refrain from granting property rights to employees, as a means of avoiding the "impartial decisionmaker" dilemma which results from the Wisconsin Court's decision.[4]

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[4]The Wisconsin Supreme Court held that the reasons for discharge, i.e., breach of contract and striking contrary to law implicated the teachers' liberty interest, because "such charges could detrimentally affect an individual's reputation in the labor market and thereby significantly undermine his opportunities for re-employment." 66 Wis. 2d at 490-91, 225 N.W.2d at 669, (A. 249). Petitioners think that plaintiffs' liberty interests are not involved, and the Wisconsin decision should be reversed. The MERA contains no criminal penalties for violating the strike prohibition. The teachers alleged the strike in court pleadings. (A. 220) Further, the teachers themselves proclaimed they were on strike by their picketing. See the Findings of the Wisconsin Employment Compensation Divison, reprinted in the Petition for Certiorari herein at A. 86, 87. They themselves did not perceive their conduct as dishonest, immoral or stigmatizing. *Board of Regents v.*

Legislatures may be further deterred from granting property rights to employees because the Wisconsin decision requires either that courts make *de novo* determinations, or that the legislature create (and fund) double agencies for each unit of government, in order to provide "uninvolved" decisionmakers.

Although the decision is by its terms limited to teachers, it could logically apply to any unit of government where the employer must also bargain with a union, including the State itself.

Any employer-employee relationship is to some extent adversary[5] as to policy choices; what to teach and how to teach it, for example. The Wisconsin decision encourages employees to emphasize the adversary relationship as a means of substituting a court as the effective decisionmaker. Compare *Johnson v. Board of Regents*, 377 F. Supp. 227 (W.D. Wis. 1974), *aff'd.*, 510 F.2d 975, (7th Cir., 1975) where a university chancellor who had participated in a decision that layoffs were necessary also decided who should be laid off. The challenge to that allocation of functions upon due process grounds was unsuccessful.

Roth, 408 U.S. 564, 573 (1972). Compare *Robison v. Wichita Falls & North Texas Com. Act. Corp.*, 507 F.2d 245 (5th Cir. 1975).

Future employment opportunities were not foreclosed since the Board itself offered to reemploy them. (A. 40, 158) That offer can be communicated by the employees to future employers. On nearly identical facts no liberty interest was found. *Lake Michigan College Federation of Teachers v. Lake Michigan Community College*, 518 F.2d 1091 (6th Cir. 1975).

[5]The Wisconsin Supreme Court said: ". . .[i]n those situations where an employed teacher is discharged or otherwise disciplined and due process is required, and the School Board is in an adversary position. . . ." 66 Wis.2d at 498, 225 N.W.2d at 673 (A. 257).

V. THIS COURT'S PRIOR DECISIONS DO NOT PROHIBIT A LOCAL ELECTED GOVERNMENT ENTITY FROM EFFECTIVELY IMPLEMENTING A POLICY TO CONTINUE ITS MANDATED LEGAL FUNCTION MERELY BECAUSE IT ALSO COLLECTIVELY BARGAINS WITH EMPLOYEES WHOSE STRIKE HAS STOPPED THOSE FUNCTIONS.

The touchstone of the procedural due process clause of the Federal Constitution is protection of an individual's property or liberty from arbitrary deprivation by the government. *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974).[6] Where government decisions hinge on findings of fact the Constitution requires those procedural elements which enhance the government's ability to ascertain the true facts thereby reducing the possibility of mistaken or erroneous action. E.g., *Goss v. Lopez*, 419 U.S. 565 (1975); *Wolff v. McDonnell, supra; Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970). However, this Court has carefully avoided applying the due process clause in a manner that circumscribes the ability of the government to exercise informed discretion. *Wolff v. McDonnell, supra; Goss v. Lopez, supra.* The Court has been particularly reluctant to limit discretion in the areas of employment and education. See, *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Opinion of Mr. Justice Powell, concurring); *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961); *Goss v Lopez, supra.*

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[6]Collateral benefits may result from the prescription of particular procedures. For example, judicial review is enhanced by requiring actions to be taken only after a record hearing. See, McCormack, *The Purpose of Due Process: Fair Hearing or Vehicle For Judicial Review*, 52 Tex. L. Rev. 1257 (1974). But record hearings have not been uniformly required by this Court. E.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Morrissey v. Brewer*, 409 U.S. 471 (1973). In any event, a record hearing was held in this case.

In *Wood v. Strickland*, 420 U.S. 308 (1975), school officials were sued for damages by students alleging that in expelling them the school officials had denied them due process of law. In determining the standard governing immunity for School Board members, this Court stated that common law traditions and public policy considerations entitled school officials to qualified immunity from liability for damages under the Civil Rights Act. The extent of that immunity, however worded, "must be such that public school officials understand that action taken in the good faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances will not be punished and that they need not exercise their discretion with undue timidity." 420 U.S. at 308. After all "[t]he system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members, and § 1983 was not intended to be a vehicle for federal court correction of errors in the exercise of that discretion which do not rise to the level of violations of a specific constitutional guarantee." 420 U.S. at 326.

Since there is no risk of a decision based on erroneous or mistaken facts in this case, the decision below unnecessarily circumscribes the discretion of school officials.

A. The School Board Could Accurately Determine That The Teachers Were Striking.

The plaintiffs here do not attack the fact-finding procedures used by the School Board; the teachers conceded that the Board could find they were striking. (A. 86, 98) The Wisconsin Supreme Court held they were striking and that the strike was prohibited by state law. The teachers

were granted a hearing after notice on charges filed by the school superintendent, were represented by counsel, and were provided an opportunity to present relevant evidence and an opportunity to argue on the record.[7] There are no allegations of pecuniary interest or personal bias by any member of the Board. Compare, *Gibson v. Berryhill*, 411 U.S. 564 (1973); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971); *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Tumey v. Ohio*, 273 U.S. 510 (1927).

The School Board had no responsibility that might tempt it to erroneously find a teacher to be striking. The School Board wanted and needed to find teachers who were not striking in order to conduct classes. Compare, *Ward v. Village of Monroeville*, 409 U.S. 57 (1972). A nonstriking teacher who has not reported for work is only absent. Return to the classroom is imminent. A return to work is in the Board's interest. A correct finding of fact is compatible with both the individual's interest and the Board's. These factors were noted in both *Lake Michigan College Federation of Teachers v. Lake Michigan Community College*, 518 F.2d 1091, 1099 (6th Cir. 1975) and *Rockwell v. Board of Education*, 393 Mich. 616, 227 N.W.2d 736 (1975), *appeal docketed*, 44 U.S.L.W. 3207 (U.S. No. 75-466). In both cases no Federal Constitutional defect was found in the employers holding hearings to determine wheth-

[7]There is no dispute that plaintiffs were given an opportunity to present their views on what to do in response to the continuing strike. The notices of hearing indicated that discharge was being considered as a response to the continuing strike. (A. 39, 237). Repeatedly, counsel for the Association argued that bargaining was the only way to settle the dispute. (A. 72, 73, 88, 97). Those arguments did not include an offer to return to work. Counsel for the Association, in fact, at no time indicated when the teachers would return. That the Board was not persuaded to substitute more bargaining coupled with continuation of the strike for the hearings does not suggest that the plaintiffs were denied a meaningful opportunity to be heard.

er employees were in fact striking. *Rockwell* also notes that the risk of erroneous identification of a striker is further minimized by procedures that invite the teacher to return to work before the hearing. That was done twice by the Hortonville School Board. (A. 151-52, 231-32) Those strikers who did return-to work were not discharged. (A. 160, 234)

B. Prior Cases Do Not Hold That A Government Cannot Exercise The Discretion Given To It By Statute Where The Facts Are Undisputed.

The Wisconsin Supreme Court recognized that plaintiff teacher's due process claim was not directed at the Board's fact-finding processes. The procedural attack here is directed at the School Board's statutory discretion to determine what to do about the illegal strike.

The Wisconsin decision holds that *Morrissey v. Brewer*, 408 U.S. 471 (1972) requires an uninvolved decisionmaker to determine what to do about undisputed facts. *Morrissey* involved review of an initial decision that the parolee had engaged in conduct that warranted revocation of parole. The risk of an arbitrary deprivation of liberty was obvious: the state provided no hearing of any kind prior to imprisonment. Both the existence of a parole violation and the decision whether to revoke parole depended on accurate knowledge of the parolee's *past* conduct. 408 U.S. at 480, 484. This Court ordered only improved fact-finding procedures. The parole board, which had a predictive and discretionary function in addition to its fact-finding responsibilities, was not prohibited from determining whether that conduct, accurately established, warranted revocation: "If it is determined that petitioners admitted parole violations

to the parole board, as Iowa contends, and if those violations are found to be reasonable grounds for revoking parole under state standards, that would end the matter." 408 U.S. at 490.

Goldberg v. Kelly, 397 U.S. 254 (1970) also involved fact-finding procedures—the application of existing welfare standards to individual cases. Fact-finding was also the concern in *Tumey v. Ohio*, 273 U.S. 510 (1927) and *Ward v. Village of Monroeville*, 409 U.S. 57 (1972). In both cases the mayor/judge was responsible for determining what the defendant's past conduct was and whether that conduct was prohibited by traffic laws.

In *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) this Court declined to require counsel in all probation revocation hearings because in most probation revocation proceedings the probationer admits the charges against him or has been convicted of another crime. To introduce counsel unnecessarily into the probation revocation hearing was thought to alter significantly the role of the decisionmaker from one of a rehabilitative body familiar with the problems and practice of probation to that of a judge and thereby possibly reduce the state's ability to implement its rehabilitative objectives. 411 U.S. at 787-89.

None of these cases holds or even suggests that an elected School Board is constitutionally prohibited from exercising its substantive right to discharge the striking employees.

C. *Withrow v. Larkin*, 421 U.S. 35 (1975) Recognizes That The Bare Presence Of Two Functions Does Not Disqualify A Decisionmaker.

The Wisconsin Supreme Court found no suggestion, allegation or proof that the School Board members did not

act in good faith. The Court stated: "This is not to suggest, of course, that the board members were anything but dedicated public servants, trying to provide the district with quality education while still keeping within its limited budget." 66 Wis.2d at 494, 225 N.W.2d at 671 (A. 253) That statement is consistent with this Court's decisions: "Without a showing to the contrary, state administrators 'are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.' *United States v. Morgan,* 313 U.S. 409, 421 (1941)." *Withrow v. Larkin,* 421 U.S. 35, 55 (1975). *See also, Suckle v. Madison General Hospital,* 362 F.Supp. 1196 (W.D. Wis. 1973), *aff'd.,* 499 F.2d 1364 (7th Cir. 1974).

Groppi v. Leslie, 404 U.S. 496 (1972), "assumes that there are situations in which there is no need for an impartial decisionmaker if the right to notice and opportunity to be heard is adequately respected." *Lucas v. Wis. Electric Power Co.,* 466 F.2d 638 (7th Cir. 1972). In *Groppi* the legislature held the defendant in contempt (which resulted in imprisonment) two days after the conduct occurred in the legislative chambers. The legislature provided the defendant with no notice or opportunity to be heard before passing the contempt resolution. Noting that there was no need to act quickly because the conduct which had prevented the legislature from pursuing its business had ceased, this Court reversed because the defendant had no opportunity to be heard.

In *Arnett v. Kennedy,* 416 U.S. 134 (1974) the Court declined to apply procedural due process to void the decision of a government official to discharge one employee who had allegedly made disparaging comments about the

official, where the comments formed the basis for the discharge. In *Arnett* the government could have easily reassigned the decisionmaking responsibility to another individual within the agency who would apply the agency's substantive standards. Here, the state's interest in maintaing the School Board as decisionmaker is substantial. In such circumstances a showing of actual pecuniary interest or personal bias should be required before concluding that the proceeding was constitutionally defective. Compare, *Gibson v. Berryhill,* 411 U.S. 564 (1973), *Tumey v. Ohio,* 273 U.S. 510 (1927) and *Mayberry v. Pennsylvania,* 400 U.S. 455 (1971), with *Withrow v. Larkin, supra.*[8] See also the opinion of Mr. Justice White in *Arnett v. Kennedy,* 416 U.S. at 171.

VI. REVIEW PROVIDED UNDER STATE LAW PROTECTED AGAINST ANY SUBSTANTIVELY UNLAWFUL DISCHARGES AND ANY FACTUAL ERROR.

Review of the School Board's decision to discharge the striking teachers was available by common law writ of certiorari, as the Wisconsin Supreme Court noted. 66 Wis. 2d at 496, 225 N.W.2d 672 (A. 255). In a certiorari proceeding the court could determine whether the Board kept within its jurisdiction, acted on a correct theory of law, whether it acted arbitrarily and whether the evidence supported the determination. 66 Wis.2d at 496, 225 N.W.2d 672 (A. 255).

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[8] *Ward v. Village of Monroeville,* 409 U.S. 57 (1972) is consistent. Whether a driver has violated the traffic code should not be influenced by the city's financial problems. However, the decision, "what to do" about schools closed by an illegal strike *must* be influenced by the district's financial condition and the need to provide educational services.

The Wisconsin Supreme Court also cited *Millar v. Joint School District No. 2*, 2 Wis.2d 303, 86 N.W.2d 455 (1957). Under *Millar* teachers have the right to bring a breach of contract action, in which a court can review the evidence relied upon by the School Board and determine whether the improper conduct found constitutes sufficient cause for discharge.

The striking teachers did not pursue either remedy.

Under the Wisconsin Municipal Employment Relations Act (MERA), it is a prohibited practice for either party to fail to bargain in good faith, or to breach a collective bargaining agreement. An employer may not encourge or discourge membership in a labor organization by discrimination in regard to terms or conditions of employment (which includes discharge). Wis. Stat. § 111.70(3) (1973); *Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B.*, 35 Wis.2d 540, 151 N.W.2d 617 (1967). There is no allegation or finding that the strike at Hortonville was related to a Board prohibited practice. Neither any teacher nor the teachers' Association has ever filed any prohibited practice complaint over any aspect of the collective bargaining or the strike. The Wisconsin Supreme Court cited *Muskego-Norway* in discussing the review available to the teachers under state law. *Muskego-Norway* holds that the WERC is an expert agency in labor matters, with broad powers to fashion relief, including the authority to overturn a discharge even if only one of the motives for any discharge is to discriminate against lawful union activities.

It is not clear why the Wisconsin Supreme Court considered these alternative remedies inadequate. Apparently, that Court was influenced by its speculation that the School Board might choose discharge and replacement as a convenient means to eliminate the labor dispute. However, this unsupported speculation does not warrant a finding that the Board is a constitutionally deficient decisionmaker. The possibility that the Board was so motivated is directly contradicted by the finding that the record does not suggest anything but actions of dedicated public servants. 66 Wis. 2d at 494, 225 N.W.2d at 617 (A. 253). Any anti-union bias is clearly prohibited by the MERA. Here, the Board's termination notice advised the teachers that they were eligible for rehire. That offer prevents any inference of anti-union motivation as evidenced by respondents failure to seek relief under the MERA.

VII. THE STRIKING TEACHERS HAD NO PROPERTY INTEREST WHICH REQUIRED THAT THEY BE AFFORDED A DIFFERENT DECISIONMAKER SINCE THE CONDUCT FOR WHICH THEY WERE DISCHARGED WAS CONTINUING; DISCHARGE COULD HAVE BEEN AVOIDED MERELY BY RETURNING TO WORK.

The focus of this case is not on past conduct but on continuing illegal conduct that stops the government's entire function. That continuing conduct is deliberate and wholly within the control of plaintiffs. Plaintiffs could have avoided any hardship or loss by simply accepting any of the several Board solicitions to return to work.

Plaintiffs were not paid while they were striking, and thus any interest in employment they may have had did not include an immediate income stream. Plaintiffs had the ability to avoid any deprivation. All that was required was that plaintiffs abandon their illegal action and respond to the Board's persistent entreaties to return to work. Even after the Board communicated that it had determined that

the district's interests required opening the schools, the plaintiffs refused to mitigate their unlawful conduct.

Since the status quo after the strike began and before the discharges was that the teachers were not performing the duties required of them as a condition of their employment, the teachers are here essentially contending they have a property interest in remaining on strike and unreplaced. *cf. Farrelly v. Timberlane Regional School District*, 114 N.H. 564, 324 A.2d 723 (1974).

VIII. CONCLUSION

The allocation of bargaining and employment-discharge decisions to the elected School Board is an intelligent grouping of government functions for a small local unit of government.

The striking teachers had no significant legitimate interest which would be served by upsetting the statutory allocation of functions. Thus, the Wisconsin Supreme Court's decision unnecessarily sacrifices the State's interest to insubstantial Federal constitutional concerns.

The *per se* challenge to the School Board's role "assumes too much and would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity." *Richardson v. Perales*, 402 U.S. 389 (1971).

The judgment of the Wisconsin Supreme Court should be reversed.

Respectfully submitted,

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NO. 74-1606

In the

Supreme Court of the United States

October Term, 1974

[illegible] SCHOOL DISTRICT NO. 1, BOARD OF EDUCATION OF [illegible] JOINT SCHOOL DISTRICT NO. 1, [illegible], ROBERT VACA, JEAN [illegible], and [illegible] PLAMANN VICTOR [illegible], individually and as [illegible] Board of Education of Menasha Joint School District No. 1, and MARVIN ONEIL ROBERT [illegible], individually and as administrators [illegible] Joint School District No. 1,

Petitioners,

v.

[illegible] ASSOCIATION and MICHAEL [illegible], JEAN MARIE OLSON, THOMAS WADEAU, [illegible] AUDREY LIGHTY and DONALD HAMMOND,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of Wisconsin

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BRIEF FOR RESPONDENTS

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In the
Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1606

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; BOARD OF EDUCATION OF HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; ROGER WEIHING, ROBERT HAUK, JEAN MEADS, FLOYD MEYER, MERLIN PLAMANN, VICTOR SCHROTH and RONALD SURPRISE, individually and as officers and members of the Board of Education of Hortonville Joint School District No. 1; and **MARVIN OBRY, ROBERT KOHLS and GENE RIEDL,** individually and as administrators of Hortonville Joint School District No. 1,

Petitioners,

vs.

HORTONVILLE EDUCATION ASSOCIATION and MICHAEL WISNOSKI, ROSE MARIE OLSON, THOMAS NADEAU, JUDY MURPHY, RUSSEL LICHTE and RONALD HAMMOND,

Respondents.

On Writ of Certiorari to the Supreme Court
of the State of Wisconsin

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

The individual respondents are teachers who brought the underlying action on behalf of themselves and all other teachers in the Hortonville Joint School District. The respondent Hortonville Education Association is their union

and bargaining agent. The members of the petitioner School Board, under Wisconsin law, are the persons responsible for engaging in collective bargaining with the teachers. They assumed this responsibility and did not delegate it to anyone else.

A collective bargaining agreement had last been reached in 1972 for the 1972-1973 school year. Commencing in the spring of 1973, the teachers attempted, through their association, to reach a collective bargaining agreement for the 1973-1974 school year. None was reached and the teachers commenced working during the 1973-1974 school year without a new collective bargaining agreement while continuing negotiations. As the year passed, the negotiations expanded to cover the 1974-1975 school year as well.

The negotiations did not proceed smoothly. The parties were often hostile and bitter towards each other. The teachers believe and have publicly stated that the failure to reach agreement was due to a lack of good faith bargaining by the School Board and further that the School Board was attempting to destroy their relatively young union. (A. 123) The Board, on the other hand, charges that the failure to reach agreement was due to the intransigence of the union, and that the Board had made reasonable offers which were rejected by the respondents. (A. 112-114) Thus, a hostile atmosphere existed between the parties as a result of intensive and unsuccessful labor negotiations.

Under Wisconsin law, §118.22(2), Wis. Stats., school boards must decide on or before March 15 of each year whether to renew or to refuse to renew individual contracts with teachers. Acting pursuant to this statute, the School Board in the spring of 1974, offered all of the teachers contracts for the 1974-1975 school year. (A. 190)

Therefore, by March 15, 1974, the teachers were staring into a second school year without a new collective bargaining agreement and with continued reliance upon the old 1972-1973 collective bargaining agreement.

In response to this situation and their beliefs about the Board's motives, the teachers commenced a strike on March 18, 1974. (A. 173) The members of the Board issued a public statement explaining their view of the positions of the parties in negotiations prior to the strike. The members of the Board publicly announced that they had four options open to them and that these were:

> "(a) meet their requests.
>
> (b) fill the school with substitutes.
>
> (c) ask for a court order returning them to class.
>
> (d) send them a letter of termination and hire permanent replacements." (A. 114)

Intensified collective bargaining, mediation and arbitration were not mentioned as options by the Board. The Board members announced that they had chosen to fill the school with substitutes at that time "because they felt the strike would be short lived." (A. 114) Without terminating the teachers, the Board was able to open the school using substitutes. (A. 192)

On March 29, 1974, the Hortonville Board of Education decided to implement option (d) by scheduling disciplinary hearings for each individual teacher who was then engaged in a strike. Notices of disciplinary hearings were prepared and delivered to the Outagamie County Sheriff's Department for service on each teacher. Eleven teachers were served notices, including the day of service, four days before the scheduled hearing. Fifty-one teachers were served three days prior to the hearing. Twenty-two teachers were

served two days prior to the hearing. Three teachers were served one day prior to the hearing and one teacher received her notice on the day of her hearing. (A. 175-176)

These notices charged the teachers with breach of their employment contract and engaging in an unlawful strike. The notices advised that the teachers could be disciplined with termination of the employment contract and that after a hearing, "the Board will notify [the teachers] in writing of what disciplinary action, if any, the Board has determined appropriate." (A. 163-164) The notices at no point advised that the contracts for employment during the 1974-1975 school year were threatened.

On the first day set for hearings, April 1, 1974, the teachers attended *en masse*. At that hearing the counsel for the teachers objected to the sufficiency and adequacy of the disciplinary hearing notices, objected to the Board of Education acting as the decisionmaker in their cases, requested the opportunity to present evidence in defense and in mitigation of punishment, made an offer of proof when that request was denied, requested and was denied the opportunity to adversely examine members of the Board, who were parties to the bargaining underlying disciplinary hearings, and protested the fact that the Board's attorney acted as both prosecutor and counsel for the decisionmaker. (A. 69, 91, 93-96)

At a closed meeting on April 2, 1974, the Board of Education voted to terminate the employment of the teachers. Notices of termination were then sent out. Those notices purported to terminate the existing contracts for the 1973-1974 and the future contracts for the 1974-1975 school years. (A. 157-158)

Following the terminations, the respondents, the Hortonville Education Association and six of the fired teachers, brought a class action in the Circuit Court for Outagamie County, Wisconsin, against the school district, the Board of Education, the members of the Board and the administrators of the school district. The amended complaint alleged four separate causes of action. (A. 132-142)

The first and principal cause of action challenged the conduct of defendants on due process grounds, relying on both the Fourteenth Amendment to the United States Constitution and Article I of the Wisconsin Constitution. (A. 138) Essentially, the complaint alleged that the notice and hearing provisions afforded were inadequate. The second cause of action alleged a denial of equal protection with respect to favored treatment by the Board toward teachers who were not represented by the Hortonville Education Association. The third cause of action challenged the Board's conduct on the grounds that it was taken in violation of the Wisconsin Open Meeting Law, §66.77, Wis. Stats. The fourth cause of action challenged the Board's conduct with respect to hiring replacement teachers.

The Circuit Court granted the Board's motion for summary judgment with respect to the first cause of action of the complaint and sustained their demurrers with respect to the second, third and fourth. (A. 210-212) [1]

The trial court, in granting summary judgment, examined the record to determine the areas of factual controversy which could be resolved by a trial. [2] The trial court

---

[1] Only the first cause of action contains the issues presented here.

[2] Under Wisconsin law, a motion for summary judgment is not deemed to be a trial by affidavit. If there are disputes with respect to the relevant facts or the inferences to be drawn from the facts, the motion should be denied and the case should be set for trial on the merits. *Peterson* v. *Truck Ins. Exchange,* 65 Wis. 2d 542, 546, 223 N.W. 2d 579 (1974).

concluded that, under Wisconsin law, a striking employee had not quit his employment. The trial court, applying Wisconsin law, held that a discharge by the employer was required to sever the employer-employee relationship, citing *Marathon Electric Mfg. Corp.* v. *Industrial Commission,* 269 Wis. 394, 69 N.W. 2d 573 (1955) and *Fredericks* v. *Industrial Commission,* 4 Wis. 2d 519, 91 N.W. 2d 93 (1958). (A. 187)

The trial court then went on to analyze the property and liberty interests of the teachers. The trial court held that there was a dual property interest. First of all, the teachers had an interest in their then-existing individual contracts for the 1973-1974 school year. Secondly, the teachers had an interest pursuant to state law in working during the 1974-1975 school year due to the operation of §118.22(2), Wis. Stats. and the fact that the actions of the School Board took place after March 15, 1974. (A. 190) With respect to the liberty interests of the teachers, the court concluded that the charges against the teachers established a sufficient stigma under local conditions "that in all likelihood . . . the plaintiff teachers' prospective employment opportunities [would be diminished]." (A. 191) The trial court thus concluded that the due process provisions of the state and federal constitutions were applicable.

The trial court then proceeded to analyze the scope of the hearing which was required under the circumstances of this case. The trial court noted that there was no dispute within the affidavits presented to the court in support of and in opposition to the motion for summary judgment with respect to the question of whether the teachers were in fact on strike. (A. 185) The trial court concluded that the concession of this fact by the teachers avoided the need for a fair and impartial tribunal.

> "The plaintiff class either was on strike in violation of Sec. 111.70(4)(1), Stats., or it was not on strike. If the fact was that a strike was in existence as set forth in the defendants' affidavit herein, then there could be no defense to the charge for Sec. 111.70(4)(1) expressly prohibits strikes in the public employment sector." (A. 195) [3]

The trial court went on to note that if the Wisconsin law allowed a defense to the charge of striking such as provocation or justification, then the procedures employed by the School Board would probably not have been sufficient to comport with the commands of the Constitution. (A. 196-198) Thus, the trial court concluded that under the precise circumstances of this case, coupled with its view of the applicable Wisconsin law, due process was not violated. [4]

The teachers petitioned the Wisconsin Supreme Court to assume original jurisdiction in this case. (A. 216-226) On September 24, 1974 the petition for original jurisdiction was denied, but the Wisconsin Supreme Court entered an order allowing an expedited appeal. (A. 227-228) The court also allowed the teachers to present all constitution-

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[3] This was the critical analysis of Wisconsin law which was ultimately determined to be erroneous by the Wisconsin Supreme Court. The trial court failed to recognize that discharge was not an automatic penalty and that any penalty must consider the entire situation which led to the strike for purposes of mitigation.

[4] With respect to the third cause of action challenging the secret meeting of the Board, the trial court held that there was no violation of Wisconsin law. On appeal of that issue, the Wisconsin Supreme Court affirmed the sustaining of the demurrer. No argument is presented to this Court concerning that ruling. With respect to the second and fourth causes of action, those were repleaded and have not been the subject of any appeal for they are still pending in the trial court.

al issues involved, even though some of these issues may not have been presented directly in the trial court. (A. 236), 66 Wis. 2d at 479, 225 N.W. 2d at 663.

On February 5, 1975, the Wisconsin Supreme Court handed down its decision. The summary judgment entered by the circuit court was reversed and the case was remanded to the trial court for further proceedings consistent with the Supreme Court's opinion.

While the court rejected several constitutional arguments raised by the teachers, it agreed that due process had been denied them because of a lack of a fair and impartial decisionmaker. The Court agreed with the trial court that the teachers, under Wisconsin law, had a dual property interest in their jobs for the 1973-1974 school year and for the 1974-1975 school year. The Supreme Court also agreed with the trial court that the teachers' liberty interests were threatened by the actions of the Board. Therefore, the Wisconsin Supreme Court, in agreement with the trial court, concluded that due process of law must be provided to the teachers. At this critical juncture, the Supreme Court of Wisconsin held that under Wisconsin law there were more issues to be determined by the decisionmaker than merely whether there was a strike in progress.

> "It is important to note that procedural due process is not limited to the factual determination as to whether an individual did or did not engage in the particular conduct. It extends as well to the action taken by the state once that conduct is established. As stated in *Morrissey, supra*, page 488:
>
> > 'This [due process] hearing must be the basis for more than determining probable cause; it must lead to a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation. The parolee must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that violation does not warrant revocation.'
>
> "Therefore it would seem essential, even in cases of undisputed or stipulated facts, that an impartial decisionmaker be charged with the responsibility of determining what action shall be taken on the basis of those facts. The principle of fair play is an important factor in a consideration of due process of law. *General Electric Co.* v. *Wisconsin Employment Relations Board* (1958), 3 Wis. 2d 227, 241, 88 N.W. 2d 691; *Durkin* v. *Board of Police & Fire Comm.* (1970), 48 Wis. 2d 112, 122, 180 N.W. 2d 1." (A. 252), 66 Wis. 2d at 493, 225 N.W. 2d at 671.

Thus, the court held that under Wisconsin law discharge is not an automatic penalty for engaging in a prohibited public employee strike and that the penalty to be imposed, if any, must be reasonable under all of the circumstances. An examination of the circumstances includes a full analysis of the activities of all of the parties prior to the strike. [5]

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[5] Justice Robert Hansen in a concurring opinion, believed that "straight" contract law was applicable in this case. Under Wisconsin law the failure to show up for work does not automatically allow rescission. Litigation will ultimately be necessary to determine the status of the parties. In this litigation, under Wisconsin law, analysis of the circumstances, including the actions of the Board, would be considered. (A. 267) 66 Wis. 2d at 506, 225 N.W. 2d at 677. The position advocated by the petitioners before this Court, that the existence of a strike is the only issue under Wisconsin law, was only accepted by the two dissenters on the seven man Wisconsin Supreme Court.

Further interpreting Wisconsin law and procedure, the Wisconsin Supreme Court found that the Board was responsible for negotiating the school district's position with the teachers and, at the same time, had the authority to impose punishment for engaging in a prohibited strike. The Wisconsin Supreme Court held that this situation allowed the School Board to conclude the bargaining process on its own terms by exercising the expedient power to discharge the teachers, who were their adversaries in the negotiating process.

> "[The Board members] were, however, not uninvolved in the events which precipitated decisions they were required to make. The decision to discharge was possibly a convenient alternative which would eliminate their labor problems in one fell swoop." (A. 253), 66 Wis. 2d at 494, 224 N.W. 2d at 671.

The possession of such a weapon by one of the parties to an underlying dispute created such a real risk of partiality when that party sat as a decisionmaker with respect to the other party's conduct as to violate basic principles of due process of law.

The Wisconsin Supreme Court, having determined that the situation presented by this case reflected an area of unfairness under present Wisconsin law, further decided to interpret that law to avoid constitutional problems. Relying upon a Wisconsin Constitutional provision[6], the Wisconsin Supreme Court fashioned a temporary remedy.[7]

[6] Sec. 9, Art. I, Wisconsin Constitution.

[7] The court held that this remedy would cease upon enactment of appropriate legislation. (A. 257), 66 Wis. 2d at 498, 225 N.W. 2d at 673.

The Court held that in circumstances in which a teacher has property or liberty interests at stake thereby entitling him to due process, and a school board is considering discipline, the teacher is entitled to notice, a hearing and a statement of reasons. The court also held that in those rare situations like the one at bar, where the above stated factors are present and, in addition, the school board is in an adversary position, the school board can make the initial decision with respect to imposition of discipline[8] but a dissatisfied teacher "can, upon petition, obtain a *de novo* determination *of all issues* in any court of record in the county where the school district or a part of it is located." (A. 257), 66 Wis. 2d at 498, 224 N.W. 2d at 673. (Emphasis supplied).

Both parties moved for rehearing before the Wisconsin Supreme Court. The Board argued, on various grounds, that due process was either not required or had been satisfied. The teachers argued that since a violation of their right to due process had been found, the purported discharges were of no legal effect and that they were entitled to immediate reinstatement with a claim for back pay until such time as a meaningful hearing complying with due process requirements was held. On March 28, 1975, the Wisconsin Supreme Court, after correcting a part of its opinion, denied both motions for rehearing. (A. 284), 66 Wis. 2d at 507a, 225 N.W. 2d at 678.

The School Board and the other defendants below then petitioned for certiorari to this Court. The teachers filed

[8] Thus, the statute involved was not declared unconstitutional as applied. A procedure to avoid constitutional attack was devised.

a conditional cross petition.[9] On October 6, 1975, this Court granted the Board's petition. To date, no action has been taken on the conditional cross petition.

SUMMARY OF ARGUMENT

This case is concerned with due process requirements in the course of disciplinary proceedings involving teachers who have property and liberty interests implicated by those proceedings. The teachers were discharged as a penalty for striking, not to open schools. The case does not involve an assessment of the propriety of teacher terminations as a vehicle to reopen schools because the terminations were neither necessary for nor accomplished because of such a goal. There were many means available to the School Board to reopen the schools, had that truly been its wish, without discharging the teachers. The procedures utilized in discharging the teachers must be viewed in the same context in which they were actually intended, that is, as part of a disciplinary proceeding aimed at punishment.

Under Wisconsin law, the purpose of the disciplinary hearing was not only to determine whether the teachers did in fact engage in a prohibited strike, but also to consider every other relevant aspect surrounding the strike. The entire set of events must be viewed fairly and impartially because of the requirement under Wisconsin law that any penalty to be imposed for engaging in a prohibited strike must be reasonable under all the circumstances. Dis-

[9] *Hortonville Education Association, et al.*, v. *Hortonville Joint School District No. 1, et al.*, Conditional Cross-Petition for Writ of Certiorari to the Supreme Court of the State of Wisconsin, October Term, 1974, Case No. 74-1638.

charge is not an automatic penalty nor is it an alternative available simply at the whim of the decisionmaker. Surrounding circumstances, such as those tending to show mitigation, may well warrant the imposition of a lesser penalty or none at all and may make discharge unreasonable.

The trial court and the Wisconsin Supreme Court found that the teachers had property and liberty interests entitling them to procedural due process protections at the time of the disciplinary hearings. Their property interests existed by virtue of employment contracts, statutory renewal procedures and a master agreement between their union and their employer limiting discharge to just cause. Because discharge could only be imposed as a penalty if reasonable under the circumstances, due process required a decisionmaker sufficiently impartial to give a fair assessment of the circumstances surrounding the strike in order to determine the appropriateness of any penalty assessed.

The School Board was an adversary of the teachers in the factual circumstances giving rise to the strike. The teachers allege that bargaining between their union and the School Board was intentionally stifled by the Board in order to provoke a strike and give ostensible justification for terminating the teachers and thereby destroying the union. The School Board made public statements prior to the disciplinary proceedings in which it defended its own conduct and placed the blame for negotiation deadlocks on the teachers and their union. Consequently, when the School Board sat as a decisionmaker to impose "reasonable" punishment on the teachers it was in a position where it would be required to judge its own conduct. In fact, the Board actually refused to allow any consideration

of its conduct thereby precluding any meaningful exposition of the facts involved. The Board was so intertwined in the underlying controversy and had so wedded itself to a position adverse to the teachers that it could not practically view the teachers' position impartially in that to do so might require criticism of its own conduct. Under those circumstances, the Wisconsin Supreme Court was correct in finding that the probability of bias was so high as to preclude the School Board from having unquestionable authority with respect to the imposition of what is required to be a reasonable penalty.

The decision of the Wisconsin Supreme Court accommodates the conflicting interests involved. It places the fundamental principle of due process of law in the paramount position to which it is entitled. At the same time, the decision provides a vehicle to minimize the financial exposure of taxpayers in cases of potential violations of employee rights by public officials who are likely to lack impartiality through the requirement that action taken be subject to prompt *de novo* judicial review. The ruling does not inhibit the legislative granting of property rights but simply insures that due process requirements arising from the granting of rights will in fact be respected.

Wisconsin has a long and innovative history in the area of labor relations. The State's concern with labor relations has extended into the area of public employment as well. The fundamental goal throughout this historic experience has been to provide a framework of fairness to promote peace, and the decision of the Wisconsin Supreme Court in this case is consistent with that goal.

ARGUMENT

I.

THIS CASE DOES NOT CONCERN THE ARSENAL AVAILABLE TO A SCHOOL BOARD TO REOPEN A SCHOOL WHICH HAS BEEN STRUCK; THE ISSUES INVOLVED IN THIS CASE CONCERN THE PROCESS DUE TO TEACHERS WHO ARE DISCIPLINED BY A STATE AGENCY.

The petitioners and their *amici* at various points argue that this case is concerned with the ability of a school board to reopen its schools when they have been struck in contravention of state law. In fact, the case involves the imposition of discipline upon municipal employees and the process due in such circumstances.

The Board had several alternatives available to it had its goal truly been simply to reopen the schools. Under Wisconsin law, it could have sought judicial intervention in the form of an injunction proceeding. *Joint School District No. 1, City of Wisconsin Rapids* v. *Wisconsin Rapids Education Association,* ..... Wis. 2d ....., ...N.W. 2d ..... (1975) (Case No. 116, August Term, 1975). The School Board could also have sought factfinding before the Wisconsin Employment Relations Commission. §111.70 (4) (c) 3, Wis. Stats. The School Board could have sought mediation before the Wisconsin Employment Relations Commission (WERC). §111.70(4)(c) 1, Wis. Stats. The School Board could have intensified or, at a minimum, continued negotiations with the teachers. It could have hired substitutes.

In this case, the School Board opened the schools prior to the termination of the teachers by employing substitute teachers. Indeed, it is these substitute teachers who became

the core of the permanent replacement teachers subsequent to the discharge of the teachers. There is no showing in this record that the Board would have had any difficulty staffing the school with substitute teachers without first discharging the striking teachers. Thus, the ability and power of the Board to reopen the schools are not at issue here. The only issue here is the procedures due the teachers when discipline is imposed against them by their adversaries in a dispute. This is a municipal employee discipline case.

The Board argues at page 13 of the Brief for Petitioners that the teachers were terminated in order to hire replacements. This argument is specious, at best, and there is no citation to any part of the record to support the statement. Other teachers could well have been continued as substitutes rather than replacements with equal success even if the Board truly had felt there was no action it could take to convince the striking teachers to return to their classrooms. In fact, since substitute teachers were placed in the classes and the schools were reopened, the record itself demonstrates conclusively that discharge was not necessary to reopen the schools.

By discharging the teachers, the Board prevented them from returning to their jobs and totally frustrated collective bargaining, the goal of Wisconsin law.[10] §111.70(6), Wis. Stats. By merely hiring substitutes without discharge the Board could not possibly create a monetary risk for

[10] If this case is ever tried, the teachers are prepared to prove that they made an offer in a related lawsuit in April of 1974 to return to their jobs conditioned only upon discipline being imposed by an impartial decisionmaker. This offer was rejected by the Board. This case is referred to in the concurring opinion of Justice Robert Hansen. (A. 267-268), 66 Wis. 2d at 506-507, 225 N.W. 2d at 678.

two staffs, and the School Board well knows that. Striking teachers do not get paid in Wisconsin. See Brief for Petitioners, p. 31.

The path pursued by the School Board was consistent with one goal—to create a situation in which the teachers were forced to engage in a job action, thereby presenting an ostensible justification for the drastic action of discharge. Its action with respect to discharge is not at all consistent with its statements in its brief that the purpose was to open the schools.

It is very easy for the Board at this juncture to state that its purpose in discharging the striking teachers was motivated by its desire to reopen the school. It is easy because there has never been any trial of this matter to determine the truth of that statement. The Wisconsin Supreme Court registered skepticism that this action was necessary to reopen the schools. That court indicated that the Board had available to it "mediation, injunction, continued collective bargaining or arbitration". (A-255), 66 Wis. 2d at 496, 225 N.W. 2d at 672.

The teachers submit that a job action was the only practical method to obtain intensive bargaining with this unresponsive, slow moving School Board. The teachers also believe that the Board refused to bargain in good faith and that it was attempting to destroy their union. They believe that they will be able to prove this if they are allowed to proceed and have the issues surrounding their discharge examined by an unbiased decisionmaker. The teachers also believe that they will be able to prove that at some point in March of 1974, prior to their discharge, the Board locked out the teachers from the school. (A-95). The teachers also believe that they will be able to prove that the Board ignored all alternatives other than discipline and all

types of discipline other than discharge because discharge was the goal of the Board all along.

The Wisconsin Supreme Court recognized that this was a discipline case and recognized the inherent unfairness of allowing public employment to be terminated under circumstances such as these. (A-252), 66 Wis. 2d at 493, 225 N.W. 2d at 671. Contrary to the petitioners' statements (Brief for Petitioners, p. 13), however, the Wisconsin Supreme Court did *not* hold that the School Board could not discharge the teachers under the federal Constitution. The Wisconsin court held that in all situations the discharge decision must be made by the Board in the first instance, but pointed out that in situations where due process is applicable and the School Board and teachers are in adversary positions, the teachers should have the right of *de novo* consideration of all issues before an impartial judicial officer. (A. 256-257), 66 Wis. 2d at 497-498, 225 N.W. 2d at 673. That decision was based upon due process of law pleaded as arising from both the United States and Wisconsin Constitutions. (A 138).

There is no dispute that municipal employee strikes, including those engaged in by public school teachers, are prohibited under Wisconsin statutory law. §111.70(4)(1), Wis. Stats. There is no dispute that discipline may be imposed upon striking municipal employees. There is also no dispute that discharge may be one of the penalties allowed[11] In the absence of judicial intervention, there is no

[11] The only statutory penalty for engaging in a strike, however, is a fine of $10.00 per day and then only if striking continues following a judicial order compelling a return to work. §111.70(7), Wis. Stats. The union itself can be subjected to a fine under contempt proceedings. *Kenosha Unified School District No. 1* v. *Kenosha Education Association,* ..... Wis. 2d ....., ... N.W. 2d ....., (1975) (Case No. 157, August Term, 1975).

automatic penalty for striking, and, in fact, any penalty imposed must be reasonable under all of the circumstances. *Durkin* v. *Board of Police and Fire Comm.,* 48 Wis. 2d 112, 180 N.W. 2d 1 (1970).

The Wisconsin Supreme Court said that the determination of reasonableness of penalty includes a consideration of all of the options available to the Board. Thus, under Wisconsin law, the bald assertion by the Board in this brief that they had to fire the teachers to open the schools is nothing more than a defense which needs to be tried. The teachers dispute that factual assertion. It is a factual issue like all others, to be determined upon trial. Obviously, if the Board is successful in persuading the trier of fact that this action was necessary to open the schools and that the district was threatened with irreparable harm, then perhaps the discharges were reasonable under Wisconsin law. In any event, there is no way that this can be accepted as a fact prior to a trial. The record presently before the Court indicates substantial question with respect to the validity of that claim by the School Board especially since they were able to open the schools prior to discharge.[12]

[12] An example of allegations asserted as "facts" before this Court which must be tested in the state courts is found on page 17 of the Brief for Petitioners. There it is stated that 180 days of school must be held before June 30 of each year or state aids will be lost. The respondents dispute that statement. Although §115.01(6), Wis. Stats., defines the "school year" as commencing July 1 and ending June 30, neither §121.02(1)(h) nor §121.17(2)(a) requires that the 180 days of school in a year coincide with the "school year". Cf. §PI 8.01(2)(h), Wis. Adm. Code. Furthermore, under §121.17(2), state aids need not be withheld if a failure to meet the minimum number of school days "was occasioned by some extraordinary cause not arising from intention or neglect on the part of the responsible

(footnote continued)

Thus, this is a disciplinary proceeding with respect to municipal employees and the question concerns the process due in such a disciplinary proceeding. The issue to be determined in any such hearing is the reasonableness of any penalty to be imposed under all of the circumstances of this case. Whether the Board had to fire the teachers in order to reopen the schools or had other options available to it are, at best, defenses and factors to be considered by the trial court in determining reasonable discipline. They are matters to be determined upon a trial applying Wisconsin law.

II.

THE PETITIONERS AND THEIR AMICI IMPROPERLY STATE THE PRESENT STATUS OF WISCONSIN LAW WHEN THEY ASSERT THAT THE ONLY ISSUE TO BE DETERMINED IN ANY HEARING AFFORDED TO THE TEACHERS IS WHETHER THEY WERE ON STRIKE; EVEN ASSUMING THAT THE TEACHERS WERE ON STRIKE, THE PENALTY TO BE IMPOSED, UNDER WISCONSIN LAW, MUST BE REASONABLE UNDER ALL CIRCUMSTANCES OF THE CASE AND DISCHARGE IS NOT THE AUTOMATIC PENALTY.

The underpinning of the position taken by the petitioners and all of their *amici* is either a subtle suggestion or a

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(footnote continued)
officers." Thus, if the Board members are as faultless as they suggest, they should have no fears. In any event, as a practical matter the argument is immaterial:

> "[A]pparently no school district has been denied state aid for failing to meet this test despite the occurrence of strikes". Feinsinger and Roe, "Teacher Collective Negotiations", as printed in *A Candid Discussion of Issues in Education*, commissioned by Wisconsin Department of Public Instruction (1975), Ch. 9, at 133.

flat statement that the only issue to be determined in any hearing is whether a strike was being engaged in by the teachers. Although only intimated at earlier points in the petitioners' brief, it is concluded at page 24 that "the School Board accurately determined that the teachers were striking." This turns into an argument at page 26 that "prior cases do not hold that a government cannot exercise the discretion given to it by statute where the facts are undisputed."

The "facts" which the petitioners assert are undisputed is the single fact of striking. That is the precise position taken by the petitioners before the trial court in this case and adopted by the trial court. The argument is that if striking can be established, there are no other facts to be determined or considered by the agency because the penalty of discharge is automatic. The Wisconsin Supreme Court stated that the law of Wisconsin is not that simple. The issue of reasonableness of penalty to be imposed for the improper conduct is also present and requires the decisionmaker to take into account all of the various factors surrounding the dispute, including the activities of the Board itself. That critical fact is conveniently forgotten by the petitioners.

The *amici* for the petitioners totally misinterpret the opinion of the Wisconsin Supreme Court with respect to state law by similarly limiting what they believe to be the area of inquiry in any such hearing. The brief of the National School Boards Association states, at page 16:

> "Even if it is assumed that ultimately futile collective bargaining negotiations culminating in a strike will generate antagonism between School Board members and the union, or the teachers' representatives, or even the teachers as a group, it is not reasonable

> to assume that such antagonism would render a School Board member incapable of accurately determining whether an individual teacher engaged in an illegal strike."

The *amicus curiae* brief on behalf of the County of Broome, State of New York, at page 13, states:

> "Assuming public employees are entitled to an initial determination of whether they are on strike, whether that determination must be made by the courts rather than by the public employer depends upon the balancing of interests in light of the realities."

The brief of the petitioners and the two *amici* briefs mentioned above are actually masking their real argument. They are surreptitiously asking the United States Supreme Court to overturn the decision of the Wisconsin Supreme Court with respect to the latter's interpretation of Wisconsin law. The other two *amici* briefs on behalf of the petitioners are not so subtle in their approach. They practically assert directly that the Wisconsin Supreme Court misinterpreted Wisconsin law.

The brief of the Wisconsin Association of School Boards, Inc., states, at page 14:

> "The Wisconsin Supreme Court found that procedural due process is constitutionally required when determining what course of action should be taken on the facts. *Amicus* will, in the next sub-part of this brief, submit that the Court misinterpreted the purpose of the hearing."

Clearly, the real argument of petitioners is that the Wisconsin Supreme Court incorrectly decided the purpose of a Wisconsin hearing under Wisconsin law. Of course, that is not an issue for the United States Supreme Court since this Court must accept the meaning of Wisconsin law as stated by Wisconsin courts. *Groppi* v. *Wisconsin*, 400 U.S. 505, 507 (1971).

The brief on behalf of the Chamber of Commerce of the United States of America, as *amicus curiae*, really states the issue as bluntly as possible at page 18:

> "The Wisconsin Supreme Court's decision that an impartial decisionmaker be interposed in such a case so that all facts will be considered and a reasonable response selected is tantamount to saying that some public employee strikes are justifiable under Wisconsin law and a response less severe than discharge should be selected when the facts and evidence appear to justify the strike."

That statement is a reasonably complete and accurate analysis of the Supreme Court of Wisconsin's interpretation of Wisconsin Law. The Wisconsin Supreme Court did not hold that, under Wisconsin law, discharge was an automatic penalty for striking.[13] That was the erroneous conclusion of the trial court here. The Wisconsin Supreme Court held that the determination that a strike is in progress is only one fact which must be determined by this type of disciplinary hearing.

Any response to the fact of striking must be reasonable after a consideration of each and every factor which surrounds the strike. As correctly observed by the Chamber of Commerce, the Wisconsin Supreme Court held that the teachers can defend and mitigate their actions by showing the intransigence of the Board.

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[13] Congress established discharge as the penalty for striking. 5 U.S.C. §7311(3)(4). Congress has also declared striking to be a crime. 18 U.S.C. § 1918(3)(4). New York's Taylor Act provides substantial sanctions. 9 Civil Service Law, §210 (N.Y., McKinney), reprinted at 18-24, *Amicus Curiae* Brief on Behalf of County of Broome, State of New York. The Wisconsin Legislature created no penalty for striking except upon violation of an injunction. §111.70(7), Wis. Stats.

It is in this setting that the decision of the Wisconsin Supreme Court must be viewed. It is in this setting and Statement of Wisconsin law that the Wisconsin Supreme Court reversed the decision granting summary judgment and remanded the case for further proceedings to the trial court.[14] In those further proceedings, the trial court will be presented with all of the various factors and events leading up to the strike. After an appropriate record has been made, the trial court will then be in a position to make

[14] It is because of the setting and the statement of Wisconsin law that the respondents challenged the petitioners' jurisdictional claim in the brief in opposition to the petition for certiorari. Under 28 U.S.C., §1257(3), the basis claimed by the petitioners, there must be a final judgment or decree from a state's highest court and the validity of a state statute must be drawn into question on the ground of being repugnant to federal law. Neither factor is present here.

The order of the Wisconsin Supreme Court vacated a summary judgment and remanded for proceedings on the merits, and either side can seek further review from the Wisconsin Supreme Court following that proceeding. §274.09, Wis. Stats. The judgment is not final. *Montgomery Building & Construction Trades Council* v. *Ledbetter Erection Co.*, 344 U.S. 178, 180-81 (1952); *Market Street R. R. Co.* v. *Railroad Comm.*, 324 U.S. 548, 551 (1945). Section 1257 was not intended to allow piecemeal review of state court judgments. *Local No. 438* v. *Curry*, 371 U.S. 542, 550 (1963).

Although §118.22(2) of the Wisconsin Statutes was challenged on due process and equal protection grounds, the decision avoided the challenge by construction and procedure delineation which saved it. (A-256-257), 66 Wis.2d at 497-498, 225 N.W.2d at 673. The Wisconsin court also relied on state cases in even finding an initial reason to create a procedure. (A-252), 66 Wis. 2d at 493, 225 N.W.2d at 671. Consequently, no state statute was found repugnant to federal law, and the party who challenged the statute is not prosecuting this review.

findings of fact and conclusions of law with respect to the activities of the teachers and of the Board in this dispute.[15]

This result harmonizes Wisconsin's municipal employment relations law with respect to teachers and law enforcement or firefighting employees. Section 62.13(5)(i) of the Wisconsin Statutes allows *de novo* judicial review of the reasonableness of disciplinary proceedings against police and fire employees, including *de novo* review of the reasonableness of any penalties imposed. In *Durkin* v. *Board of Police & Fire Comm.*, 48 Wis. 2d 112, 180 N.W.2d 1 (1970), the Wisconsin Supreme Court held that the leader and supervisory officer in a strike had a right to have the reasonableness of the penalty determined by a judicial proceeding.[16] There, discharge was not even considered even though firemen were involved, a vital municipal service. The Wisconsin Supreme Court indicated that even a

[15] The briefs of the petitioners and their *amici* consistently refer to a sketchy record. The teachers point out that the decision of the Wisconsin Supreme Court is amply supported by the record available. However, it is incongruous for the Board to be complaining about the record in this case since they are the ones who have prevented the teachers from making a record. Before the Board, the teachers wished to make a record about the bias of the Board but were prevented from doing so by a ruling of the Board that this was not an appropriate issue. Subsequently, this case was won by the petitioners before trial on a motion for summary judgment.

[16] The Wisconsin Supreme Court cited *Durkin* for the proposition that an impartial decisionmaker was necessary to determine "what action shall be taken on the basis of" even undisputed or stipulated facts. (A-252), 66 Wis.2d at 493, 225 N.W.2d at 671.

lengthy suspension without pay might be unreasonable under the circumstances.[17]

The teachers presented this disparity of rights to the Wisconsin Supreme Court as an equal protection argument. This is mentioned as issue 3 in the opinion of the Supreme Court of Wisconsin. (A-235), 66 Wis.2d at 478, 225 N.W.2d at 663. Since the court created a remedy of *de novo* review in harmony with rights afforded police and fire employees, the issue was never again discussed by the Wisconsin Supreme Court for it became moot.[18]

Consistent with this general philosophy of investigation of all of the circumstances of a municipal labor dispute, the Wisconsin Supreme Court recently ruled that a school board could not secure an injunction against strikers by merely showing the existence of the strike. *Joint School District No. 1 City of Wisconsin Rapids* v. *Wisconsin Rapids Education Association,* ..... Wis. 2d ....., N.W.2d ..... (1975) (Case No. 116, August Term, 1975).

[17] In *Durkin,* the decisionmaker in the first instance was the Board of Police and Fire Commissioners. They were not the body charged under Wisconsin law with negotiating with the union. Thus, they did not suffer from the same constitutional infirmity as the Hortonville Board. Despite this, Durkin, under Wisconsin law, had a right to a judicial decision on the reasonableness of the penalty under *all* of the circumstances.

[18] The teachers in their conditional cross petition for a writ of certiorari request review of the equal protection issue in the event this Court decides adversely to the teachers with respect to the due process question. Police and fire employees in Wisconsin obtain *de novo* judicial consideration of the reasonableness of any discipline imposed upon them whether or not the fire and police commission are adversaries. At this juncture, teachers only obtain *de novo* review when there is an adversary relationship.

> "Public employment strikers are a reality which cannot be ignored. While the potential for immediate and serious harm to public health and safety is very real in the case of strikes by policemen, firemen and, to a lesser extent, sanitation workers, it is not critical where, for example, the strike is one by teachers, clerical employees or construction workers and others. We conclude in this case that immediate and serious harm to public health and safety was not apparent and that an injunction should issue only after a showing of irreparable harm dependent upon the facts and circumstances as shown at the hearing."
>
> (Slip opinion pp. 15-16).

The trial judge in that case made a condition of the injunction that the School Board bargain in good faith, and in a contempt proceeding he concluded that there had been a violation by the teachers of his order upon making a finding that the Board had bargained in good faith subsequent to the order.

It thus appears that even though Wisconsin law prohibits strikes, injunctions against teachers' strikes are not automatic. The conduct of the parties can be reviewed in such a judicial proceeding.[19] With respect to strikes by police and fire employees, penalties may be imposed against the leaders of a strike, but the reasonableness of the penalty under

[19] If the Wisconsin Supreme Court is reversed in this case, then Boards will resort more and more to discharge because procedurally this will be an easier, although brutal, method to resolve municipal labor disputes. The purpose of the Wisconsin Act is to promote peace in such labor disputes. If the most drastic resolution, discharge, is the easiest one, the purposes of the Wisconsin Act will be demolished. All of the decisions of the Wisconsin Supreme Court force the parties, *no matter what they try to do,* under all circumstances to an impartial, neutral and detached decisionmaker who undoubtedly will press for a resolution to the dispute.

all of the circumstances can be reviewed in a *de novo* judicial proceeding.

The decision of the Wisconsin Supreme Court in interpreting Wisconsin law in this case merely harmonized the other areas of Wisconsin municipal employment relations law with respect to an attempt by a school board to discharge teachers. The penalty to be imposed for striking is not automatic in Wisconsin. Discharge is just one of many possible punishments, if any, to be imposed for the conduct. Furthermore, *de novo* judicial review of the penalty is available so that all of the facts and circumstances, including the conduct of the Board itself, can be reviewed in making a judgment.

The petitioners and their *amici* totally misconstrue Wisconsin law when they attempt to assert that the school boards in Wisconsin have unreviewable discretion to deal with teachers who are on strike. The issues to be resolved are much greater than merely whether the teachers were on strike. It is in this context of Wisconsin law that the due process claims of the teachers must be considered.

III.

THE DECISION OF THE WISCONSIN SUPREME COURT CORRECTLY HELD THAT DUE PROCESS OF LAW WAS REQUIRED AND THAT ONE OF THE ELEMENTS OF DUE PROCESS IS AN INDEPENDENT DECISIONMAKER.

The question presented by the petitioners concerns whether the School Board was prohibited by principles of due process from terminating the teachers because the School Board was not sufficiently impartial. (Brief for Petitioners, p. 2). The question presented concedes a lack of sufficient impartiality on the part of the School Board.

Consequently, the issues are: (1) Were the teachers entitled to due process of law under either the state or federal constitution at the time termination was contemplated; and (2) if so, was an independent decisionmaker one of the elements of the process due.

The teachers alleged in their amended complaint to the state circuit court that they were entitled to due process of law in the disciplinary proceedings pursuant to the Wisconsin Constitution and the Fourteenth Amendment to the United States Constitution. The circuit court, and, ultimately, the Wisconsin Supreme Court, agreed. Both courts held that the teachers were entitled to due process because they were deprived of their property and because their liberty was interfered with as a result of state action.

There is no dispute that state action is present. The petitioner Hortonville Joint School District No. 1 is organized under the laws of the state and is a municipal employer. §111.70, Wis. Stats. The petitioner School Board and its members are charged with the responsibility of managing the petitioner school district. Chapters 118, 120, Wis. Stats.

A. The Teachers Had Property Interests Which Were Sufficiently Implicated to Give Rise To Due Process Requirements.

The existence of property and liberty interests is essentially a matter of state law, and both state courts agreed that property interests were implicated under the facts of this case.

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate

claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

"Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents* v. *Roth,* 408 U.S. 564, 577 (1972).

In addition to state laws and rules, legitimate expectations of continued employment giving rise to property interests can clearly be founded upon contractual arrangements between the parties.

"A written contract with an explicit tenure provision clearly is evidence of the formal understanding that supports a teacher's claim of entitlement to continued employment unless sufficient 'cause' is shown." *Perry* v. *Sindermann,* 408 U.S. 593, 601 (1972).

In fact, expectations of continued employment and resulting property interests can exist in the absence of statutes, rules or contracts, if the circumstances denote implied agreements resulting from the parties' conduct in view of surrounding circumstances and past history. *Id.* at 602.

In this case, the property interests arise by the most direct of methods. With respect to the 1973-1974 school year, the teachers were in the midst of their contract period and their employment was terminated despite the existence of individual contracts. Teachers removed from office during the terms of their contracts are clearly entitled to due process. *Wieman* v. *Updegraff,* 344 U.S. 183 (1952).

A property interest exists under such circumstances. *Carpenter* v. *City of Greenfield School District No. 6,* 358 F. Supp. 220 (E.D. Wis. 1973). Furthermore, the parties were operating under an extension of the last (1972-1973) collective bargaining agreement which allowed discharge only for "just cause". (A. 43) See *Connell* v. *Higginbotham,* 403 U.S. 207 (1971).

With respect to the 1974-1975 school year, for which the school board purported to withdraw "and/or" terminate individual contracts, the teachers had an expectation of continued employment based on state law. Section 118.22 (2) of the Wisconsin statutes requires that notice of renewal or refusal to renew individual contracts be given on or before March 15th of each year. No refusal to renew had been given by that date. Consequently, the teachers were entitled to employment for the 1974-1975 school year under the terms of their existing individual contracts, according to the statute. Cf. *Goldberg* v. *Kelly,* 397 U.S. 254 (1970).

As stated by the Wisconsin Supreme Court, because of the existence of the 1973-1974 contracts and the statutory entitlement to contracts for the 1974-1975 school year, the action by the school board seeking to terminate the teachers' employment "unquestionably amounted to a deprivation of property within the intendment of the due process clause." (A. 248), 66 Wis. 2d at 489, 225 N.W. 2d at 669.

The petitioners dispute that and suggest that the teachers abandoned their property interests by engaging in a strike. They also argue that if process is due, it is limited by the terms of employment and was met here.

B. The Teachers Did Not Abandon Their Property Interests.

Abandonment of property interests, like the existence of property interests, is a matter of state law. Both the trial court and the Wisconsin Supreme Court rejected the abandonment argument. Before the trial court, the petitioners urged that the terms "strike" and "quit" be equated in order to alleviate any constitutional duty on their part. The argument totally ignored the fact that the teachers' ability to walk away from their contract was no more unfettered than was the school board's. (A. 54, 55) Furthermore, as the trial court pointed out, under Wisconsin law a strike is a cessation of work but it does not constitute a termination of the employer-employee relationship; that results from discharge. (A. 187), citing *Marathon Electric Manufacturing Corp.* v. *Industrial Commission,* 269 Wis. 394, 69 N.W. 2d 573 (1955) and *Fredericks* v. *Industrial Commission,* 4 Wis. 2d 519, 91 N.W. 2d 93 (1958). The trial court also pointed out that if striking by itself constituted a severance of the employment relationship there would be no basis for injunctive relief on behalf of the employer, a remedy long recognized under Wisconsin law.[20]

The Wisconsin Supreme Court did not believe it was even necessary to go as far as the trial court did to reject the petitioners' abandonment argument. It held that the purpose of the due process hearing was to determine ini-

[20] Under Wisconsin law, a teacher cannot gain employment elsewhere unless the present contract is dissolved. §118.22(2), Wis. Stats. This statute would be rendered meaningless if the Board is correct. A teacher could simply engage in a "strike", thereby avoiding all contractual obligations, and then accept employment with another board.

tially whether each teacher did, in fact, engage in the strike as alleged prior to determining what penalty, if any, could reasonably be imposed under all the circumstances giving rise to that conduct if so proven. The argument that the right to a meaningful hearing had been abandoned by the very conduct which must be proved as an element of that hearing was dismissed as "circular reasoning". (A. 248), 66 Wis. 2d at 489, 225 N.W. 2d at 669.

C. The Property Interests Were Not Limited; Arnett v. Kennedy Is Not Applicable.

In addition to the argument that the teachers abandoned their property interests, petitioners suggest that the due process protections afforded to the teachers are limited by the statutory provisions giving rise to the property interests which call due process protections into play. The argument is based on *Arnett* v. *Kennedy,* 416 U.S. 134 (1974), which the petitioners state "should be directly controlling". (Petition for Writ of Certiorari, p. 8). The *Arnett* argument is inconsistent with the abandonment argument in that the former necessarily requires a concession that the teachers do indeed have property interests while the latter denies their existence. The principal problem with the *Arnett* argument, however, is that it requires an interpretation of the statutes giving rise to the property interests and a conclusion that those same statutes legitimately limit the due process protections flowing therefrom. In this case, the property interests arise from both individual contracts and state statutes and, in addition, the Wisconsin Supreme Court in interpreting the statutes specifically held that they did not limit the due process rights of the citizens whose property interests evolved under the statutes. After examining the Wisconsin statu-

tory scheme in light of the *Arnett* argument advanced by the petitioners, the Wisconsin Supreme Court concluded:

> "The plurality [in *Arnett*] thus concluded that the extent of the property right was limited by the act itself, and hence due process was not required. There is no analogous situation here." (A. 254), 66 Wis. 2d at 495, 224 N.W. 2d at 672.

The United States Supreme Court was interpreting an act of Congress in *Arnett* and, consequently, had the final word on interpretation of the act's meaning. Similarly, in this case the Wisconsin Supreme Court was interpreting an act of the Wisconsin legislature and its interpretation must be accepted. *Groppi* v. *Wisconsin,* 400 U.S. 505, 507 (1971). Thus *Arnett* is not applicable at all.

Even if this Court believes there is some basis for reviewing the Wisconsin Supreme Court's interpretation of Wisconsin law in this respect, it is clear from an analysis of *Arnett* that that case has no application to the facts of the case at bar. Indeed, if *Arnett* were considered applicable to the facts of this case, such a conclusion would require an inferential overruling of both *Roth* and *Perry,* a result which is clearly unwarranted in view of this Court's express reliance on and differentiation of *Roth* and *Perry* in *Arnett.*

In *Arnett,* the United States Supreme Court was presented with the question of whether a public employee in the federal classified competitive civil service could be discharged without a pretermination hearing. The termination was accomplished under the Lloyd-LaFollette Act, 5 U.S.C., §7501, which provides an extremely detailed procedure for termination, including specific notice, an opportunity to respond, a post-suspension appeal proceeding which includes a completely *de novo* evidentiary trial with

respect to both facts and punishment before an independent decisionmaker, and a right to reinstatement with full back pay.

Three justices (Rehnquist, J., the Chief Justice and Stewart, J.) concluded that there was no requirement that a terminated employee in the civil service be provided with a full due process hearing prior to termination. That conclusion followed a detailed analysis of the history and applicability of the Lloyd-LaFollette Act. Justice Rehnquist, speaking for those three justices, pointed out that prior to the Lloyd-LaFollette Act there was no right to continuing employment and that civil service employees could be discharged at the whim of their superiors. Thus, the Lloyd-LaFollette Act created a limited property interest in continued employment by virtue of adding the requirement that discharge be for cause as defined in the Act. However, Justice Rehnquist also pointed out that the same act which gave rise to that limited property right also provided the method of protecting it. Because the property right granted was so limited, because it was granted by the same legislative act which described the method of protecting it, and because the review procedures were specifically defined by Congress to enforce the right it was granting, Justice Rehnquist stated that the Act did not violate the due process clause.

Justice Powell, with whom Justice Blackmun concurred, agreed that Mr. Kennedy's discharge did not contravene procedural due process requirements, but on other grounds. He concluded that the Lloyd-LaFollette Act could not limit the procedural due process requirements of the Constitution, but that it had not done so in that case. Since the detailed removal procedure under the Act allowed for a *de novo* evidentiary hearing on administrative appeal with

respect to both guilt and punishment, and reinstatement with back pay, he felt that the due process clause was satisfied.

Justice White also held that the Act could not limit the due process requisites of the Constitution. He believed that the pretermination hearing provided by the Act coupled with the full evidentiary hearing afterwards would be acceptable if the pretermination hearing were held before an impartial hearing officer. He construed the Act to require an impartial hearing officer.

Justice Marshall, with whom Justices Douglas and Brennan joined, held that despite the terms of the Act, due process required a full evidentiary hearing before an impartial decisionmaker on the facts of *Arnett*.

It is obvious that *Arnett* does not control the case presently before the Court in the sense which the petitioners urge. The only majority conclusions in *Arnett* are that a legislative act cannot limit the due process requirements of the Constitution and that the termination of Mr. Kennedy was not improper. There is no precedent in *Arnett* for the propositions sought to be asserted by the petitioners here. No more than three justices joined in any of the separate opinions.

It is also apparent that the circumstances of this case would not satisfy any of the opinions. Justice Rehnquist's opinion was based on the fact that:

> "[T]he very section of the statute which granted him that right, a right which had previously existed only by virtue of administrative regulation, expressly provided also for the procedure by which 'cause' was to be determined, and expressly omitted the procedural guarantees which appellee insists are mandated by the Constitution." 416 U.S. at 152.

Here, of course, we are not dealing with employees in the classified competitive civil service, but rather with members of a profession whose rights were outlined in *Roth* and *Perry*. Their expectation of continued employment, the property right, arises from §118.22(2), Wis. Stats., and that statute in no way limits the procedural protections of the property right granted therein. Indeed, nowhere do the Wisconsin statutes indicate that the property right granted is to be subjected to limited due process protection. Furthermore, the property interests also arise by contracts. The analogy attempted to be drawn to the Lloyd-LaFollette Act and, consequently, to Justice Rehnquists's opinion in the *Arnett* decision was rejected by the Wisconsin Supreme Court upon their interpretation of Wisconsin law.

Nor would Justice Powell's view allow *Arnett* to be applied here. There is no specific statutory procedure for review of terminations, much less one that guarantees a prompt, *de novo*, evidentiary trial-type hearing with the possible result of decreased penalty or reinstatement with back pay.[21]

Justice White's separate opinion would not appear to allow application of the *Arnett* case to the situation at bar. His view was that an independent and impartial hearing officer must be afforded prior to termination, and, because such was provided by the Lloyd-LaFollette Act, he found the Act acceptable. However, because the officer provided was not in fact independent and impartial he believed the procedure was in violation of the Constitution.

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[21] The decision of the Wisconsin Supreme Court provides the *de novo* review which was already in existence in the Lloyd-LaFollette Act. Perhaps *Arnett* would have been violated if the Wisconsin Supreme Court had not acted to save the Wisconsin law.

Justice Marshall's position was that a full hearing before an impartial decisionmaker was required prior to discharge in most cases. He also believed that at a minimum an independent decisionmaker was required in all cases.

The Wisconsin laws giving rise to the property interests in this case do not contain any specific procedural requirements concerning termination proceedings. Consequently none of those factors which the Justices deemed to be important in reaching the positions they took with respect to *Arnett* is found here.[22]

D. The Teachers Also Had Liberty Interests Entitling Them to Due Process.

Aside from property interests, a public employee is entitled to due process when his liberty is at stake as well. *Roth, supra,* at 573-574. "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin* v. *Constantineau,* 400 U.S. 433, 437 (1971). See also *Anti-Fascist Committee* v. *McGrath,* 341 U.S. 123 (1951).

On the facts of this case as presented to them, both the trial court and the Wisconsin Supreme Court had no difficulty finding that the teachers' liberty interests were at stake. The trial court, familiar with local community views at least to the same extent that the School Board members claim to be by virtue of their position as elected officials, found that charges of breaching individual employment contracts and engaging in an unlawful strike "do constitute charges that in all likelihood would diminish

[22] In *Goss* v. *Lopez,* 419 U.S. 565 (1975), the Court refused to extend *Arnett* beyond the realm of federal civil service.

the plaintiff teachers' prospective employment opportunities." (A. 191) The Wisconsin Supreme Court stated that "It is apparent that such charges could deterimentally affect an individual's reputation in the labor market and thereby significantly undermine his opportunities for reemployment."[23] (A. 249), 66 Wis. 2d at 490-491, 225 N.W. 2d at 669.

The conclusions of the trial and appellate courts are remarkably similar to this Court's conclusion on a similar issue in *Goss* v. *Lopez,* 419 U.S. 565 (1975). In speaking of charges allowing suspension of school students for up to ten days, the Court said:

> "If sustained and recorded, those charges could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment." 419 U.S. at 574.

The petitioners suggest that the teachers have no real fear concerning the effect on their reputations because they have freely entered into litigation which publicizes their conduct. (Brief for Petitioners, p. 21 n. 4). Since it should be apparent to everyone that the teachers have little chance of vindicating their rights without litigation, the petitioners' argument is sophistic. It is like suggesting that Mrs. Constantineau waived her liberty claim by presenting it publicly to this Court. See *Wisconsin* v. *Constantineau, supra.* More importantly, however, it must

[23] The Wisconsin Supreme Court may have merely adopted the view of the petitioners in their brief to that court where they said at p. 25 that a school board could "rationally conclude that being on strike is inconsistent with being a good teacher." The petitioners thus agreed below that discharge for striking could constitute a condemnation of the teachers' abilities to teach.

again be noted that the penalty imposed for engaging in a prohibited strike, under Wisconsin law, must be reasonable under all the circumstances. Thus, if the teachers are publicly branded as individuals who have been terminated for striking, the presumption in the community is that their conduct in the labor dispute was so outrageous under the circumstances that the drastic penalty of discharge was reasonable. Due process is essential so that the teachers can present their side of the issue before any such significant branding is accomplished. *Roth, supra,* at 570-571.

E. One Element of the Process Due the Teachers is an Impartial Decisionmaker.

When the Wisconsin Supreme Court concluded that it was in agreement with the trial court that the teachers were entitled to due process it accurately stated that the next question emerging is "what process is due." (A. 249), 66 Wis. 2d at 491, 224 N.W. 2d at 669. There is no dispute between the parties that notice and an opportunity to be heard are required. The dispute has essentially always centered around whether an impartial decisionmaker is also required. The trial court, operating under the assumption urged by the petitioners that the only issue to be determined was whether or not the teachers had engaged in a strike, found that "the degree of impartiality which may have been required in other settings was not necessary to adjudicate the single fact involved in this case." (A. 197) In effect, the School Board did not claim to be impartial with respect to assessing its own conduct *vis a vis* that of the teachers in the relationship giving rise to the strike. It argued that the only issue to be decided was the existence of a strike.

The Wisconsin Supreme Court, however, reversed and vacated the trial court's grant of summary judgment specifically because of the error in that view. The Wisconsin Supreme Court pointed out that Wisconsin law requires more than a demonstration that the public employees engaged in a strike. It also requires that any penalty imposed be reasonable under all the underlying circumstances. (A. 252), 66 Wis. 2d at 493, 224 N.W. 2d at 671.

That was a re-statement of existing Wisconsin law. *Durkin* v. *Board of Police & Fire Comm.*, 48 Wis. 2d 112, 180 N.W. 2d 1 (1970). Since the underlying circumstances of the strike, as well as the existence of the strike itself, were important factual matters bearing on the ultimate decision, reasonableness of penalty, the Wisconsin Supreme Court held that this was a normal due process situation in which the traditional elements of due process are required, including an impartial decisionmaker. (A. 252), 66 Wis. 2d at 493, 224 N.W. 2d at 671.

The action was presented to the state courts on the basis of both state and federal due process requirements. Consequently, the decision was presumptively based on both state and federal due process provisions. The petitioners present their question as though the only issue is whether the federal due process clause requires a sufficiently impartial decisionmaker. While the respondents dispute that particular limitation on the statement of issues, it is submitted that the answer, in any event, is a resounding "yes".

> "Concededly, a 'fair trial in a fair tribunal is a basic requirement of due process'. *In re Murchison,* 349 U.S. 133, 136 (1955). This applies to administrative agencies which adjudicate as well as to Courts. *Gibson* v. *Berryhill,* 411 U.S. 564, 579 (1973). Not only is a biased decisionmaker constitutionally unacceptable but

'our system of law has always endeavored to prevent even the probability of unfairness'. *Murchison, supra;* cf. *Tumey* v. *Ohio,* 273 U.S. 510, 532 (1927)." *Withrow* v. *Larkin,* 421 U.S. 35, 46-47 (1975).[24]

The question presented by the petitioners is whether the School Board, which is elected and has exclusive authority under state law to terminate teachers engaged in a prohibited strike, can be prohibited from doing so because its members are not sufficiently impartial. The facts before the Court show that the teachers are public employees, that they have property and liberty interests involved in the action challenged, that the School Board acts under color of state law, and, therefore that the teachers are entitled to due process of law. Since the issues involved encompass more than the mere existence of a strike, but also the reasonableness of any penalty to be imposed, past conduct and credibility of witnesses become relevant.[25] Thus, the traditional requirements of due process are applicable, including a sufficiently impartial decisionmaker. The decision of the Wisconsin Supreme Court which recognized that, whether based on interpretations of the Wisconsin or Federal Constitution, is unassailable.

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[24] *Groppi* v. *Leslie,* 404 U.S. 496 (1971) is cited on page 28 of the petitioners' brief for the proposition that there are situations in which an impartial decisionmaker is unnecessary. They do not point out that *Groppi* concerns summary contempts and that the independent decisionmaker issue was not raised there. Indeed, since *Groppi* was decided, this Court has ruled that even in summary contempt cases another judge must decide the contempt charges if the trial judge is personally provoked or embroiled in the controversy. *Taylor* v. *Hayes,* 418 U.S. 488 (1974).

[25] The trial court noted that the Board members would not be considered impartial if they had to evaluate credibility of witnesses. (A. 196)

IV.

THE WISCONSIN SUPREME COURT CORRECTLY HELD THAT THE SCHOOL BOARD WAS NOT SUFFICIENTLY IMPARTIAL TO SATISFY DUE PROCESS REQUIREMENTS.

The respondents originally brought this action in the state circuit court alleging that they were entitled to due process and that, for various reasons and in various respects, due process had not been afforded. Among the allegations made was a charge that due process had been denied in that the Board, which was sitting as a decisionmaker to impose a penalty for the conduct of the teachers, refused to consider any evidence or allow any testimony concerning its own conduct in the underlying dispute giving rise to the strike. (A. 136) The Board did not claim to be unbiased, but rather answered by alleging that proof sought to be introduced by the teachers concerning the Board's conduct, even if true, was immaterial and that there was no justification for the teachers' conduct. (A. 144) The petitioners also raised affirmative defenses of an avoidance nature, including an allegation that the teachers were not entitled to due process. (A. 147)

Summary judgment was granted the petitioners with respect to the due process claims by the circuit court. Although the court concluded that the teachers were entitled to due process of law, it accepted the petitioners' argument that there could be no defense to a strike, and, therefore, that the only issue to be determined in the due process hearing was the existence of a strike. (A. 196) The court, believing the sole issue to be whether or not the teachers engaged in a strike, and believing that that issue was not controverted, held that the type of impartiality necessary in other settings, such as "where it would be necessary for the decisionmaker to judge the credibility of witnesses and weigh the evidence", was not necessary here. (A. 196-

197) That, of course, was consistent with the position taken by the petitioners before the circuit court.

When the Wisconsin Supreme Court considered the respondents' appeal and reviewed the trial court's ruling, it pointed out that the issue to be decided was not simply the narrow one of whether a strike existed but also the question of what to do about the strikers. The Wisconsin Supreme Court recognized that circumstances in mitigation might dictate that discharge was not warranted. (A. 252), 66 Wis. 2d at 493, 225 N.W. 2d at 671. Consequently, the Wisconsin Supreme Court disagreed with the circuit court as to the extent of the need for an impartial decisionmaker.

In presenting its question to this Court, the Board again espouses the position taken before the lower courts, that is, that the situation is not one which requires a "sufficiently impartial decisionmaker". (Brief for Petitioners, p. 2). However, despite the petitioners' limitation of the issue below, and their manner of presentation of the question in the petition for certiorari, they argue in section V of their brief alternatively that they are not partial or that the respondents have not demonstrated bias.

A. The Respondents May Not Be Penalized On The Present State of the Record.

The latter argument, of course, is highly suspect in view of the status of this case. The petitioners were successful in a motion for summary judgment before the trial court, with the result that the respondents were unable to engage in any sort of trial at that level. When the Wisconsin Supreme Court vacated the summary judgment grant and ordered a meaningful hearing, the petitioners brought the action to this Court for further review. Consequently, the respondents have never had an opportunity to present evidence, beginning with the "hearing" in front of the

Board at which evidence of the Board members' conduct, which would necessarily go to bias as well as mitigation, was disallowed and an offer of proof was rejected.

An argument analogous to the one made by the petitioners here was rejected in *Groppi* v. *Wisconsin,* 400 U.S. 505 (1971). In that case, there was a challenge to a state statute that prohibited a change of venue despite the extent of local prejudice against the defendant in a misdemeanor case. With respect to an argument that the defendant had failed to demonstrate actual prejudice, the Court responded:

> "We reject the suggestion that the appellant is not in a position to attack the statute because he made an insufficient showing of community prejudice. His motion for a change of venue explicitly asked, in the alternative, that he be permitted to 'offer proof' of the nature and extent of the local prejudice against him. His motion was denied in its entirety, thus foreclosing any opportunity to produce evidence of a prejudiced community." 400 U.S. at 508 n. 5.

Here the School Board refused to allow testimony and rejected an offer of proof, all of which was intended to demonstrate the Board's conduct in the underlying dispute. The Board's prohibition foreclosed an opportunity for the teachers to produce evidence in mitigation which also would have tended to prove bias. Since, however, the Board was aware that the evidence sought to be presented by the teachers was critical of the Board members, the prohibition itself evidences bias.

B. The Question of Bias Was Properly Decided.

With respect to the petitioners' first argument, it is submitted that the issue of the petitioners' lack of sufficient impartiality, if properly before this Court, was correctly

decided by the Wisconsin Supreme Court. Since under Wisconsin law, as stated by the Wisconsin Supreme Court, discharge is not an automatic penalty for engaging in a prohibited strike and any penalty imposed must be reasonable under the circumstances, the Wisconsin Supreme Court observed that the situation presented was not unlike the situations involved in *Morrissey* v. *Brewer,* 408 U.S. 471 (1972) and *Goldberg* v. *Kelly,* 397 U.S. 254 (1970).

In *Morrissey,* which concerned parole revocations, it was pointed out that:

> "The parolee must have an opportunity to be heard and to show, if he can, that *circumstances in mitigation suggest that the violation does not warrant revocation.*" 408 U.S. at 488 (emphasis added).[26]

Since the circumstances in mitigation sought to be shown by the respondents here involve the conduct of the Board, it was obvious to the Wisconsin Supreme Court that fundamental fairness required a different decisionmaker.

As in *Goldberg* v. *Kelly,* it was not necessary for the Wisconsin Supreme Court to specifically impugn motives of the Board or find actual bias in order to recognize that fairness would not be achieved if the Board were to have

[26] The brief of the petitioners at p. 26 states that the only purpose of a parole revocation hearing is to determine whether parole should be revoked. That is an understatement. In mitigation of penalty the parolee can assert that his violations were due to unreasonable demands of his parole officer or that he misinterpreted his parole officer or that his parole officer excused prior misconduct. In the setting of parole revocation, the officer and the parolee are in enough of a conflict for this Court to require a different decisionmaker. Since, under Wisconsin law, the Board and the teachers had a similar conflict, the analogy made by the Wisconsin Supreme Court to *Morrissey* was appropriate. (A. 252), 66 Wis. 2d at 492, 225 N.W. 2d at 670.

the exclusive decision. The appearance of bias or the likelihood of bias is sufficient to disqualify a given decisionmaker.

The Court recently considered the issue in a case involving contempt citations issued against an attorney by a judge before whom the allegedly contemptuous conduct occurred. The Court specifically agreed with the state court whose judgment was being reviewed that the record did not disclose conduct that constituted such a personal attack upon the decisionmaker as to destroy the "calm detachment necessary for fair adjudication". *Taylor* v. *Hayes,* 418 U.S. 488, 501, (1974), citing *Mayberry* v. *Pennsylvania,* 400 U.S. 455, 465 (1971). Despite that conclusion, however, this Court still found the judge not to be a proper decisionmaker because he was too embroiled in the controversy.

> "In making this ultimate judgment, the inquiry must be not only whether there was actual bias on respondent's part, but also whether there was 'such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused.' *Ungar* v. *Sarafite,* 376 U.S. 575, 588 (1964). 'Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties,' but due process of law requires no less. *In re Murchison,* 349 U.S. 133, 136 (1955)." 418 U.S. at 501.

C. The Facts Involved Support A Finding of An Unacceptably High Risk of Bias.

The decision of the Wisconsin Supreme Court allowing the Board to make an initial determination of penalty subject to *de novo* consideration by an impartial judicial officer at the teachers' request was not made without rea-

son. The record, even limited as it is in view of the procedural status of the case, supports the finding.

Although the notice stated that among the purposes to be determined at a hearing was the nature of disciplinary action to be taken by the Board (A. 19), and the Board's counsel, Mr. Ruhly, stated at the hearing that the Board "will consider what discipline, if any, is appropriate under the circumstances" (A. 69), the fact of the matter is that the Board really only had one punishment in mind from the beginning to the end of the proceedings and that penalty was discharge. On the first day of the strike, the Board publicly stated its options. (A. 112-115) The hearing was an implementation of option (d) which was to "send them a letter of termination and hire permanent replacements". Thus, there was no doubt, despite pretenses to the contrary, that the result would be termination.

The issue of whether the teachers had been on strike was never open to serious debate by the Board as is demonstrated by the following colloquy between counsel:

> "Mr. Ruhly: The Board did not go on strike. The Board did not cause closing of school for several weeks. We are here to see who did go on strike.
>
> Mr. Erlke: If you know who did, why are you asking us?
>
> Mr. Ruhly: I would like each teacher to tell us whether they have a statement to make to the Board before the Board determines what disciplinary action, if any, is appropriate." (A. 80)

This was so despite the assertion by counsel for the teachers that the teachers had been "locked out of their places of employment". (A. 95) In the Board's answer, they state that the only persons who were given notices for the hearing were "those individuals who engaged in the unlawful

strike activity". (A. 129) Petitioner Weihing's affidavit also indicates that it was only those teachers "who had been and [were] then engaged in the unlawful work stoppage" who were ordered to disciplinary hearings. (A. 152) Thus, the question as to whether there was a strike or not and whether it was lawful or not had already been determined by the Board prior to the hearing.

At the hearing before the Board, counsel for the teachers objected to the Board sitting as the decisionmaker and attempted to introduce evidence tending to show conduct on the part of Board members which was believed to have frustrated the collective bargaining effort. The receipt of evidence was prohibited and an offer of proof was rejected. (A. 96) The offer of proof made and rejected contained allegations concerning the Board's conduct, including the use of coercive tactics, failure to consider certain provisions, refusal to continue bargaining, failure to notify the union concerning action taken against employees, lost school time as a result of a lock-out rather than a strike, refusal to provide information necessary for bargaining, and other factors. (A. 94-95)

Since the beginning the teachers have charged that the petitioners utilized methods calculated to provoke a strike which would enable the petitioners to terminate all teachers and hire at random from the ranks in order to destroy the effectiveness of the union. (A. 123) In their petition for an original writ to the Wisconsin Supreme Court the teachers reiterated their allegations and also alleged that the Board of Education gave favorable treatment to teachers who had engaged in a strike but who were not represented by the Hortonville Education Association. (A. 224) The respondents believe that the real purpose for the hearing was to end the labor dispute through elim-

ination of the opposition. This conclusion emerges from the totality of circumstances and is certainly stated bluntly by counsel for the Board in the following exchange:

> "Mr. Ehlke: Why don't you bargain in agreement, Jim. By the time you have them served, the whole thing would be over with and you wouldn't have to be fooling around with it.
>
> Mr. Ruhly: Mr. Ehlke, *there are many ways to dissolve a labor dispute.*" (A. 98) (emphasis supplied.)

Obviously, the labor dispute would not be "dissolved" unless the striking teachers were fired. However, resolution of the labor dispute was not supposed to be the purpose of the hearing. It was a disciplinary hearing. Counsel for the petitioners asked to utilize the time for working on the labor dispute by way of bargaining and the Board refused. The Board's actual motives were poorly disguised.

The Wisconsin Supreme Court examined the allegations made and the factual background of the case and discovered "a situation not at all conducive to detachment and impartiality on the part of the School Board." (A. 252), 66 Wis. 2d at 493, 225 N.W. 2d at 671. The School Board was a party to contract negotiations with the teachers and those negotiations had broken down. The School Board publicly asserted that its position was fair and reasonable and that the position of the teachers was not. (A. 112) When the teachers engaged in a strike and the School Board was in a position to impose a penalty, it was in a position to take action which, although under the guise of reasonable punishment, would constitute an end to its labor problems.

> "The decision to discharge was possibly a convenient alternative which would eliminate their labor problems in one fell swoop. We conclude that the Board was not an impartial decisionmaker in a constitutional sense and that the appellants were denied due process of law". (A. 253), 66 Wis. 2d at 494, 225 N.W. 2d at 671.

While perhaps it can be argued that the record was not sufficient, because of the procedural status of the case, for the Wisconsin Supreme Court to find unequivocally that the School Board was actually biased, the court would have had to have closed its eyes to ignore the probability of such bias. *Ward* v. *Village of Monroeville,* 409 U.S. 57 (1972).[27] This is not a case, as the petitioners suggest, where there is simply a mixing of functions, but rather one in which the party sitting in judgment is intimately involved with the conduct being judged. Such intimate involvement with the subject matter necessarily creates a real risk of bias. *Taylor* v. *Hayes,* 418 U.S. 488 (1974); *Mayberry* v. *Pennsylvania,* 400 U.S. 455 (1971); *Pickering* v. *Board of Education,* 391 U.S. 563 (1968).

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[27] The *amicus* brief of the National School Boards Association at 13 attempts to distinguish the impact of *Ward* by arguing that there was no pecuniary self interest on the part of the Board and that there was no "evidence that discharging the teachers was necessary to the school district's financial interests". Later at 16 they argue that the combination of the functions of "budgeting, negotiating, adjudicating, hiring and firing", were not conflicting. Those two positions are inherently inconsistent. The economic conflict found by this Court in *Ward* is clearly present here, especially if the Board believed that their budgeting problems would be less difficult without these organized teachers. One of the demands which the Board listed as leading to the impasse in negotiations concerned class size. (A. 114) That is a working condition issue. If class sizes were reduced, education would probably improve. Thus, in this instance, the Board was economically at odds both with the teacher demands and quality education.

D. This Case Involves Much More Than A Mere Mixing Of Functions.

In *Withrow* v. *Larkin*, 421 U.S. 35 (1975), the Court considered the propriety of mixing functions and whether such mixing was consistent with due process. In that case, the Wisconsin Medical Examining Board had investigated charges against a doctor prior to sitting as judge of the charges. This Court held that there had been no demonstration that the prior investigation biased the Board as adjudicator. The Court stated that:

> "The mere exposure to evidence presented in non-adversary investigative procedures is insufficient in itself to impugn the fairness of the Board members at a later adversary hearing." 421 U.S. at 55.

Here, however, we are not talking about the Board mixing the functions of investigation and adjudication. Rather, we are talking about a mixture of *participation* and adjudication. In determining an appropriate penalty to be imposed, the decisionmaker was required to consider all the factors giving rise to the strike, which included consideration of its own conduct. The Board had publicly blamed the teachers and defended its own position with respect to the underlying circumstances, and it is obvious that the Board members were

> "so psychologically wedded to their complaints that they would consciously or unconsciously avoid the appearance of having erred or changed position". 421 U.S. at 57.

The Board's initial view of the facts underlying the strike was not based on either a routine investigation or some other non-adversarial process. It derived from its own participation in the underlying dispute. As a consequence, the Board's initial view "as a practical or legal

matter foreclosed fair and effective consideration at a subsequent adversary hearing, leading to ultimate decision". 421 U.S. at 58. That fair consideration was foreclosed is demonstrated not only by a common sense assessment of the status of the parties but also by the Board's refusal to consider any evidence concerning its own conduct and the Board's decision to withdraw contracts for the upcoming school year, despite the fact that no notice was given suggesting that those contracts were threatened.

The record in this case clearly demonstrates that the situation before the Court presents the same due process deficiencies found fatal in *In re Murchison*, 349 U.S. 133 (1955), and described in *Withrow*. 421 U.S. at 53. *Murchison* involved a state law empowering a local judge to sit as a "one-man grand jury", to compel witnesses to testify in secret before him, to cite such witnesses with contempt for perjury or refusal to answer questions, and to try and convict those same people. This Court found several defects in the state procedure which constituted denials of due process.

> "As a practical matter it is difficult if not impossible for a judge to free himself from the influence of what took place in his 'grand-jury' secret session. His recollection of that is likely to weigh far more heavily with him than any testimony given in the open hearings. . . . Thus, the judge whom due process requires be impartial in weighing the evidence presented before him, called on his own personal knowledge and impression of what had occurred in the grand jury room and his judgment was based in part on this impression, the accuracy of which could not be tested by adequate cross-examination.
>
> ". . . '[A] judge-grand jury' might himself many times be a very material witness in a later trial for contempt. If the charge should be heard before that

judge, the result would be either that the defendant must be deprived of examining or cross-examining him or else there would be the spectacle of the trial judge presenting testimony upon which he must finally pass in determining the guilt or innocence of the defendant. In either event the state would have the benefit of the judge's personal knowledge while the accused would be denied an effective opportunity to cross-examine. The right of a defendant to examine and cross-examine witnesses is too essential to a fair trial to have that right jeopardized in such a way." 349 U.S. at 138-139.

The analogy to the case at bar is very clear. Before teachers cen be disciplined for engaging in a strike, Wisconsin requires that they be afforded an opportunity to present their side of the story for defense and mitigation. The testimony to be offered in support of the teachers' side necessarily involves conduct engaged in by the negotiators for the school district, that is, the School Board. It would be "difficult, if not impossible" for the School Board members to examine the evidence objectively and free themselves from the influence of their recollection of what occurred between them and the teachers in the negotiating sessions and in other contexts in the past. The School Board members definitely would be required to call on their own personal knowledge and impressions of the history of the labor dispute. They are, in fact, material witnesses to any hearing necessary to determine reasonableness of penalty. Yet because they sat as the decisionmaker, the teachers were deprived of examining and cross-examining them. The alternative would have been the School Board presenting testimony upon which it would finally pass. So as long as the School Board occupied the role of decisionmaker, the state had the benefit of its knowledge while the teachers were denied an effective opportunity to cross-examine.

Although these factors in and of themselves were found to constitute a denial of due process in *Murchison,* the present situation is even more offensive. The problem with the judge sitting as a decisionmaker for the contempt hearings in *Murchison* was his prior exposure. Here, it is prior conduct, that is, participation in the very events which are material to a determination of the reasonableness of any penalty to be imposed, and participation in those events in an adversary relationship to the parties whose conduct in those events is the subject of the disciplinary proceedings. Thus, the procedure advanced by the petitioners and found defective by the Wisconsin Supreme Court is one significant step beyond the procedure in *Murchison.*

The Wisconsin Supreme Court, on the strength of Wisconsin law, examined and interpreted local circumstances arising under local law and had no difficulty finding a situation conducive to the probability of unfairness. Not only should that conclusion be respected because of the Wisconsin Court's understanding of the special facts and circumstances before it, but also because it is obviously an accurate conclusion.

V.

THE PUBLIC INTEREST IS BEST SERVED BY NOT DEVIATING FROM GENERALLY APPLICABLE DUE PROCESS REQUIREMENTS.

The petitioners and their *amici* present various policy arguments in urging a relaxation of generally acceptable due process standards. They argue that private enterprise is not required to comply with such constitutional responsibilities. They also suggest that due process is different in this situation because of the magnitude of the problem

presented. They are suggesting here that different due process requirements with respect to the independent decisionmaker should prevail when there are 88 people involved instead of one or two. Finally, the petitioners urge that due process is different when the governmental action is initiated by persons who are elected officials.

The decision of the Wisconsin Supreme Court demonstrates that applying generally applicable due process standards nicely accommodates competing governmental interests and is especially cognizant of the taxpayers of Wisconsin.

A. The Decision Below Does Not Deny The Electorate Its Policy Voice But Rather States A Fundamental Principle: That When Government Attempts To Interfere With The Liberty And Property Interests Of Its Citizens It Must Provide Due Process.

The petitioners argue that the School Board is responsible for managing the affairs of the school district, including the hiring and firing of teachers, "subject only to direct electoral control at the annual meeting and to the authority specifically vested in other district officers." (Brief for Petitioners, p. 14). From that point, they argue that the decision of the Wisconsin Supreme Court denies the district's electorate a voice in its own affairs.[28]

[28] The petitioners recognize at Part VI of their brief, pp. 29-31, that Wisconsin law allows other remedies such as the common law writ of certiorari or petition to the Wisconsin Employment Relations Commission. Thus, even the petitioners acknowledge that the decisions of school boards were subject to judicial review and remedy prior to the decision in this case and that such judicial review did not destroy the control of the affairs of the school district by the electorate.

The entire argument is sophistry. Discharge is not an automatic penalty for striking under Wisconsin law. The penalty must be reasonable. School boards are required to bargain in good faith under Wisconsin law. §111.70(3)(a)(4), Wis. Stats. In the situation presented, the teachers were fired by the School Board, whom, the teachers allege, has not bargained in good faith, and, as the teachers further allege, has been attempting to destroy the teachers' union. Such conduct is not recognized as legitimate by Wisconsin law, whether the party engaging in it is said to represent the electorate or not. It is the function of the due process provisions of both the state and federal constitutions to allow a fair and meaningful hearing to determine whether a government agency is in fact making its decision because of the acceptable motives it claims or, rather, for the unacceptable reasons alleged by the parties affected by those decisions.

The Board's rather pious policy argument concerning its responsibility to the electorate is essentially nothing more than a smoke screen. There is nothing magic about the fact that School Board members are elected. The Wisconsin Legislature could, and in some circumstances has, directed that those members be appointed. *State ex rel. Board of Education* v. *Racine*, 205 Wis. 389, 393, 236 N.W. 553. In either event, the Constitutions of the state and federal government take precedence over political concerns, and, therefore, conduct engaged in by public officials must be constitutionally antiseptic and must follow the applicable law whether those officials are elected, appointed or acquire office in any other way. There is nothing novel about the application of procedural due process safeguards to conduct engaged in by elected public officials, as

opposed to other officials. See, e.g., *Ward* v. *Village of Monroeville,* 409 U.S. 57 (1972), and *Brown* v. *Board of Education,* 349 U.S. 294 (1955). Nor is there anything significant about the status of a school board:

> " 'The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures . . . Boards of Education not excepted.' *West Virginia* v. *Barnette,* 319 U.S. 624, 637, (1943)." *Goss* v. *Lopez,* 419 U.S. 565, 574 (1975).

B. Nothing In The Ruling Of The Wisconsin Supreme Court Inhibits The Legislative Granting Of Rights.

On pages 21 and 22 of their brief, the petitioners make perhaps the most curious argument in their entire presentation. That argument, perhaps as much as anything else in the record, indicates the total lack of sensitivity for constitutional rights which exists among the petitioners.

The petitioners recognize that property rights are created by state law. Both the trial court and the Wisconsin Supreme Court in this case, interpreting state law, found that the respondents did have property rights entitling them to due process. Consequently, according to the Wisconsin Supreme Court, which was considering both the state and federal due process requirements, the respondents were entitled to an impartial decisionmaker.

The petitioners urge that this result encourages the Legislature to refrain from granting property rights. Stripped to its essentials, the argument is that the Legislature would not grant property rights giving rise to due process protections if it really thought that due process would thereby be required. While that is probably an accurate statement of the petitioners' views concerning the way government should treat its citizens and employees, it is insulting to the legislators of Wisconsin.

C. The Wisconsin Supreme Court Decision Does Not Make Public Employee Strikers Better Protected Than Private Sector Strikers. In Reality, the Decision Protects The Taxpayers of Wisconsin.

There is no dispute that public employee strikes are presently prohibited in Wisconsin.[29] Petitioners urge that the decision of the Wisconsin Supreme Court encourages public employees to strike thereby defeating the policy enunciated by the Legislature. In point of fact, however, the decision of the Wisconsin Supreme Court does nothing of the sort.

Nothing in the Wisconsin Supreme Court's opinion authorizes strikes prohibited by the Legislature. Nothing in the Wisconsin Supreme Court's holding says that public employees may not be discharged for engaging in a prohibited strike. What the Wisconsin Supreme Court's opinion does do is reiterate existing Wisconsin law on the proposition that *any* penalty for engaging in a prohibited strike must be reasonable under all the circumstances.

In most situations, the state or local agency responsible for determining the appropriate penalty, if any, to be imposed is not the agency whose own conduct is inextricably intertwined in the underlying circumstances giving rise to the strike, the circumstances upon which appropriateness is to be judged. Since this case did present such a situation, the Wisconsin Supreme Court simply held that an adversary's imposition of penalty was subject to *de novo* review by an unbiased decisionmaker. Such a decision does not encourage striking, it encourages good faith collective bargaining.

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[29] Legislation is presently pending which could remove teachers and other non-essential public employees from the ban. Bill AB-605.

The argument that public employees are better protected than private employees ignores the essential differences between the two situations.[30] The employer here is the government. The employees have property and liberty interests. When the government proposes to take action which is designed to interfere with those interests, due process of law is required. Such is not the case in private employment situations. Correlative situations exist in many areas of the law and there is nothing unusual about the fact that an individual's rights are different when a person or group of persons taking action concerning him act under a badge of official authority.

There is a major difference in structure between the public and private sectors in addition to the nature of the employer. The investors in the private sector are persons who voluntarily purchase an interest in the private enterprise. This constitutes risk money on their part and one of the risks that they take is that the management of the company will lose a lot of money due to improper handling of a labor dispute. Such investors have voluntarily risked their money for both gain and loss.

This is not true in the public sector. While all citizens have an interest in the government whether or not they are taxpayers, ultimately, the financial risk of mismanagement of a labor dispute is borne by taxpayers. These people are in a sense involuntary investors in the system. They are certainly not comparable to investors in the private sector.

[30] The Board's argument here is also curious. In a related case, another court ordered preferential rehiring of these teachers. The Board appealed that decision after obtaining a stay. This case is mentioned in the concurring opinion of Justice Robert Hansen. The Board is really seeking the best of both worlds. Their refusal to be forced to rehire *all* teachers, rather than picking and choosing, is further evidence for a trial of their true desire to destroy the union and its leaders.

Under Wisconsin law, the Wisconsin Employment Relations Commission (WERC) is given the same powers to order reinstatement of employees with back pay in both the public and the private sectors. Section 111.70(4)(a), Wis. Stats., states:

> "Prevention of prohibited practices. Section 111.07 shall govern procedure in all cases involving prohibited practices under this subchapter except that wherever the term 'unfair labor practices' appears in s. 111.07 the term 'prohibited practices' shall be substituted."

The petitioners and their *amici* all acknowledge the possibility of a subsequent right to attempt to recover by litigation for breach of contract, litigation before the WERC, or writ of certiorari.[31] The objection that they bring to this Court is the requirement imposed by the Wisconsin Supreme Court that allows the teachers to obtain prompt *de novo* review of a decision by a Board to dis-

[31] Again the petitioners' positions are conflicting and difficult to understand. If the petitioners believe that these other procedures provide identical judicial review as the one created by the Wisconsin Supreme Court, then their complaint has no substance because it only concerns the timing of judicial review. If, on the other hand, they concede that the new hearing is truly *de novo*, as required by Wisconsin law, then not only are the other forms of review inadequate, but the need for a different decisionmaker is clearly demonstrated.

charge striking teachers. The petitioners want a later hearing, rather than a prompt hearing.[32]

The petitioners and their amici would risk the taxpayers' money by protracted litigation. If they are wrong in their assessments of their own activities, school districts face possible heavy financial penalties. The decision of the Wisconsin Supreme Court protects the taxpayers when it applies generally applicable due process procedures. By compelling a prompt review in court, the financial exposure of the taxpayers of the district is diminished substantially. If the Board is determined to be wrong in its decision to discharge, then prompt reinstatement will be accomplished and little or no back pay will be ordered because of the timeliness of the hearing.[33]

There is thus no good reason advanced for altering generally applicable due process requirements. The public nature of the matter, the high cost to involuntary taxpayers in the event of a miscalculation by the Board, and the number of persons involved in the dispute all demonstrate the need for a prompt hearing rather than a hearing after damages have expanded the taxpayers' exposure to an unbearable amount. The Wisconsin Supreme Court, by this opinion, has made sure that no other school board will jeopardize its taxpayers again in such a fashion.

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[32] The constitutional requirement, of course, if a hearing is to be meaningful, is that it be *before* a protected interest is terminated. *Board of Regents* v. *Roth*, 408 U.S. 564, 569-70 (1972); *Morrissey* v. *Brewer*, 408 U.S. 471, 476 n. 1 (1972); *Bell* v. *Burson*, 402 U.S. 535, 542 (1971); *Boddie* v. *Connecticut*, 401 U.S. 371, 379 (1971); *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); *Snaidach* v. *Family Finance Corp.*, 395 U.S. 337 (1969); *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965); *Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 168 (1951).

[33] In this case, several attempts were made by taxpayers' groups to intervene to reduce the taxpayers' exposure.

CONCLUSION

Sprinkled throughout the brief of the petitioners and their *amici* is the suggestion that the Board always acts in the interests of quality education for its citizens. The innuendo is that somehow the teachers could care less about education. Members of the Boards are part-time persons who earn next to nothing. Brief of Wisconsin Association of School Boards, Inc., as *amicus curiae*, p. 9. The teachers are professionals who are licensed, college graduates. They are devoting their entire lives to education. Some of these Board members were taught by some of these teachers. To even suggest that the teachers are disinterested in education is an affront which demonstrates the myopia of the petitioners in this labor dispute.

Wisconsin has had a long history of innovative responses to promoting industrial peace. The Wisconsin Employment Peace Act was enacted in 1939 and this law was emulated by other states. "Wisconsin led the states when, in 1959, the Legislature gave municipal employees, including elementary and high school teachers, the right to organize and bargain collectively with their employers." Feinsinger and Roe, "Teacher Collective Negotiations," as printed in *A Candid Discussion of Issues in Education*, commissioned by Wisconsin Department of Public Instruction (1975), Ch. 9, at 129. Wisconsin was the first state in the country to legislatively allow collective bargaining by public employees. *Id.* at 130.

When the Wisconsin Supreme Court made its decision with respect to the Hortonville teachers, it was not writing in a vacuum with respect to collective bargaining experience. Being a part of a state which was an innovator legislatively in this area, the Supreme Court of Wisconsin throughout the last 35 years has been faced with sub-

stantial litigation implementing and harmonizing various state policy judgments. The *Hortonville* decision is but another example of the Wisconsin experiment in promoting industrial peace and more recently in promoting peaceful resolution of municipal labor disputes. The delicate balance as achieved through decades of experience in Wisconsin should not be upset.

The respondents respectfully request that this Court affirm the judgment of the Wisconsin Supreme Court involved in this writ of certiorari.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1606

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1;
BOARD OF EDUCATION OF HORTONVILLE
JOINT SCHOOL DISTRICT NO. 1;
ROGER WEIHING, ROBERT HAUK,
JEAN MEADS, FLOYD MEYER,
MERLIN PLAMANN, VICTOR SCHROTH and
RONALD SUPRISE, individually and as officers
and members of the Board of Education
of Hortonville Joint School District No. 1;
and MARVIN OBRY, ROBERT KOHLS and
GENE RIEDL, individually and
as administrators of Hortonville
Joint School District No. 1,

Petitioners,

v.

HORTONVILLE EDUCATION ASSOCIATION and
MICHAEL WISNOSKI, ROSE MARIE OLSON,
THOMAS NADEAU, JUDY MURPHY,
RUSSEL LICHTE and RONALD HAMMOND,

Respondents.

BRIEF OF WISCONSIN ASSOCATION OF SCHOOL BOARDS, INC., AS AMICUS CURIAE

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IN THE

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Petitioners,

v.

HORTONVILLE EDUCATION ASSOCIATION and MICHAEL WISNOSKI, ROSE MARIE OLSON, THOMAS NADEAU, JUDY MURPHY, RUSSEL LICHTE and RONALD HAMMOND,

Respondents.

BRIEF OF WISCONSIN ASSOCATION OF SCHOOL BOARDS, INC., AS AMICUS CURIAE

On certiorari review of Wisconsin Supreme Court decision entered February 5, 1975 (66 Wis. 2d 469, 225 N.W. 2d 658)

This brief *amicus* in support of Petitioners is filed by the Wisconsin Association of School Boards, Inc. with the written and filed consent of the parties as provided in Rule 42.2 of the Rules of this court.

INTEREST OF WISCONSIN ASSOCIATION OF SCHOOL BOARDS, INC.

The Wisconsin Association of School Boards, Inc. (WASB) is a voluntary non-stock membership corporation authorized and organized under chapter 181 of the Wisconsin Statutes. Of the 436 public school boards in the state of Wisconsin, with a total membership of 2850 persons, some 430 boards belong to the WASB.

The stated purposes of the WASB as set forth in its Articles of Incorporation and Bylaws, are to aid and assist public school boards and public school agencies of the state of Wisconsin in performing their lawful function, primarily through meetings, communications and dissemination of information, and to promote, support and advance the interests of public education in Wisconsin.

The WASB sees in this case a grave threat to the legitimate policy making function of local school boards and, therefore, to local lay control of education and to responsive representative government at the local level.

While the WASB believes that the petitioners in this case have and will continue to skillfully and ably present and defend their position, we are concerned that their natural preoccupation with the result of the State Supreme Court's ruling, which affects them most directly and immediately, may cause them and this Court to overlook some of the deeper, broader implications of real concern to school boards generally throughout Wisconsin and our country.

The position of the Wisconsin Supreme Court here challenged is that where, after extensive collective bargaining in which the school board was not uninvolved, teachers strike unlawfully, and where all material facts are undisputed or stipulated, the school board is not a sufficiently impartial decision maker in the constitutional sense (under the due process requirements of the Fourteenth Amendment) to determine on the basis of such facts and as a matter of local school government policy what action, authorized by law, should most appropriately be taken as to the striking teachers.

The principal concern of WASB member school boards and other public employers faced with a continuing illegal work stoppage is to restore the operation of the important governmental function delegated to the employer (in this case, the reopening of the public schools) with the shortest possible delay. In making the judgmental decisions required when determining how to cope with an illegal work stoppage, the public employer must consider a number of factors. As elected public officials, school board members have great concern for their responsibility to serve their community and their duty to provide for an educational program. They are in the position to take appropriate action in the best interests of the school district and they should retain that power. Yet the court decision under review here takes from the school board the right to make such important policy decisions. The disposition made by the Wisconsin Supreme Court allows a court, and not elected public officials charged with the duty of setting school policy and managing the schools, to make public policy decisions that are better left to the local administrative body.

SUMMARY OF ARGUMENT

The system of public education in Wisconsin is deeply rooted in the State Constitution which vests the supervision of

public instruction in a state superintendent and such other officers as the legislature shall direct. The constitution guarantees to all children between the age of 4 and 20 years the right to an education in the district schools which must be established and be as nearly uniform as practicable. This education shall be free and without charge for tuition.

In compliance with the constitutional mandate, the Public Instruction Code charges public school boards in Wisconsin with the duty to operate and manage the district schools which provide education to some 1,182,000 school-age children comprising 26.2% of the state's population.

Among the primary statutory duties of the school board are the duties to bargain collectively with the teachers and employ and dismiss teachers. Strikes by public school teachers are specifically prohibited by statute and the right to discharge for cause is authorized by law.

Misplaced reliance by the Wisconsin Supreme Court on U.S. Supreme Court decisions, primarily *Morrissey v. Brewer*, 408 U.S. 471, resulted in an erroneous determination by the Wisconsin Supreme Court that the Hortonville School Board, because of its involvement in the collective bargaining process prior to the unlawful strike, was not a sufficiently impartial decision maker, in the constitutional sense, to make the determination that teachers engaged in an illegal strike should be discharged from their jobs.

The function of due process is not furthered by requiring that the decision to discharge striking teachers be made by a person or tribunal other than the public school board. A school board can adequately serve the functions required of an independent decision maker in the type of case before the court where the question to be determined is whether or not the teachers have breached their employment contracts and engaged in an illegal strike and where there are no difficult factual or legal questions to be decided.

The fairness of the school board should not be impugned merely because the board has been, or is, involved in bargaining with the union representing the striking teachers, for the combination of the duties to bargain, and to hire and dismiss teachers involves no risk of bias in the constitutional sense. Furthermore, improper motivation on the part of the school board, without factual support, should not be inferred or assumed for the members of the school board are cloaked with a presumption of honesty, fairness, and integrity, and with having consciences and intellectual discipline capable of judging a particular controversy fairly on the basis of its own circumstances.

The purpose of the due process hearing is not to determine the board's course of action with respect to collective bargaining with the teachers, nor to determine the course of action best designed to reopen the schools. These nonjudicial functions, best left to the discretion of the school board, will not be manifested in the form of an unfair decision against a teacher who did not participate in the strike.

The remedy fashioned by the State Supreme Court substantially alters the rights of striking teachers and the policy making function of the school board in that: only if discharge is determined by a court to be the most reasonable response to the labor dispute may this course of action, among those authorized by law, be taken by the school board; public school teachers acting in violation of law are accorded greater rights than their counterparts in the private sector acting within the law; public school teachers are encouraged to make the school board a real adversary even in non-strike situations; a primary duty of the school board, i.e., to restore as quickly as possible the operation of strike-bound public schools, is substantially impeded.

To require that the school board must attempt to resolve an unlawful teachers strike by exhausting all other alternatives

before resorting to discharge would have a most serious and detrimental effect on the operation of the local public schools throughout the state of Wisconsin.

These alterations of the rights of striking teachers and of the policy making function of the school board are not required by due process. The school board properly met due process requirements when it applied an existing standard (cause) for discharge. Similarly the roll of the judiciary on review should be to determine whether an existing standard was fairly applied and not to select or decide policy questions or correct decisions made in the excercise of discretion or judgment.

In balancing the interests here involved the rights of the teachers will not be significantly furthered by having a tribunal other than the school board determine the existence of "cause", whereas the governmental interests involved weigh heavy on the scales in that: the rule of necessity applies, since there is no other body available to make the decision, the requirement of an independent decision maker as distinct from other due process requirements would threaten the governmental interest in preserving the board's ability to implement policy; the logically combined functions of collective bargaining and dismissing teachers lodged in the school board by the legislature lie at the core of public school governance and the judicial divestment of one of these functions would have a highly detrimental effect on representative government and threaten local lay control of education.

Even assuming that a Wisconsin public school board is not an impartial decision maker in the setting of this case, it may, nevertheless, discharge teachers engaged in an illegal strike, and in violation of contract, since, under Wisconsin law, adequate post-termination review procedures before an impartial decision maker are provided, including action for breach of contract, review by common law writ of certiorari and review by the Wisconsin Employment Relations Commission (WERC) in a prohibited practice proceeding.

The Wisconsin Supreme Court erred in holding that the post-termination review provided by certiorari and the WERC are inadequate because neither of these alternatives authorize the independent decision maker, on review, to determine whether the school board in discharging the teachers should have taken a more reasonable course of action in response to the strike.

The decision below should be reversed.

ARGUMENT

I. School Boards In Wisconsin Are Comprised Of Elected Public Officials Charged By Law And Their Constituency With The Duty To Manage And Set Policy For District Schools.

The system of public education in Wisconsin is deeply rooted in Article X of the State Constitution adopted in 1848./[1] Pursuant to the constitutional mandate, the legislature has enacted the code on Public Instruction (Title XIV, chapters 115-121, Wis. Stats.) which provides for the establishment of

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/[1]Article X of the Wisconsin State Constitution in pertinent part provides:

> The supervision of public instruction shall be vested in a state superintendent and such other officers as the legislature shall direct; and their qualifications, powers, duties and compensation shall be prescribed by law ... Section 1.
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> The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years; ... Section 3.

district schools throughout the state, directs the organization and election of boards of education in five identified classes of public school districts, and enumerates the powers and duties of such boards.

The petitioner Hortonville district is classified as a common school district. School districts so classified predominate in number (364 districts out of a total of 436)./[2] Common school districts, along with districts classified as union high school districts, are characterized by the statutory division of policy making functions between the school electors who act when assembled at a school meeting (s. 120.10, Wis. Stats.) and the school board with duties and powers set forth throughout the school code. However, in all 5 classes the school board is by statute given sole authority and control over the employment function./[3] More specifically, as to the common school district, s. 118.22 (2), Wis. Stats., provides that "no teacher may be employed or dismissed except by a majority vote of the full membership of the board." In *Curkeet v. Joint School District*, 159 Wis. 149, 152, 149 N.W. 708 (1914), The Wisconsin Supreme Court said in relation to the common school district board's duties:

> "School boards have thereby enjoined upon them very extensive duties in maintaining the common schools and in administering the school affairs. Such duties embrace that of inquiry into the question of the failure of a teacher to perform his contract obligation as a teacher, *and if they find that a teacher has breached his contract it is their duty to take such steps as may be necessary to carry out the purposes of the school. and if a teacher has failed to perform his duties under his contract they can discharge him from further service.*" (emphasis added)

Common school districts in Wisconsin are fiscally independent and have power to levy the school tax. The annual school

/[2]Wisconsin School Boards, 1974-1975 (Wisconsin Department of Public Instruction, 1975), p. 16.

/[3]Chapters 118, 119, Wis. Stats.

tax is levied by the electors at the annual meeting after the budget hearing. s. 120.10, Wis. Stats. Duties as to the possession, care, control and management of the property and affairs of the school district, except as vested directly in the electors at the school meeting, are delegated by statute to the common school district board. s. 120.12 (1), Wis. Stats. The board is given specific authority to make rules for the organization, gradation and government of the district schools. s. 120.13 (1), Wis. Stats. All school district boards are expected to, and do, establish educational goals, approve the school program and determine district spending in accordance with the wishes of the local school community as expressed at open school meeting, the open school board meeting and at the ballot box.

In actuality these and many other functions performed by the school board require that the board members throughout Wisconsin (who serve the interests of some 1,182,000 school-age children comprising approximately 26.2% of the state's population as of July 1, 1972)/[4]be skilled decision makers. That the elected school board members are dedicated public servants is attested to by the fact that they serve without pay as an incentive. The average salary of public school board members for the school year 1974-1975 was $435.00, board members of 34 districts receiving no salary at all./[5]

For the school year 1972-1973 total public school operational costs in Wisconsin were approximately $1,040,781,000, of which approximately $682,858,000, or 65.61% represented instructional costs./[6] Local property taxes levied

/[4]Rankings of the States, 1973 (NEA Research Report, 1973), p. 9.

/[5]Wisconsin School Boards, 1974-1975 (Wisconsin Department of Public Instruction, 1975), p. 15.

/[6]Source: Statistical Records for 1972-1973, Wisconsin Department of Public Instruction.

in 1974 for support of the state's public schools totaled $895,826,831, comprising 61.26% of property taxes levied locally for all purposes (state, county, municipal and school)./7

For the 1973-1974 school year, Wisconsin public school districts, on the average, received 40% of public school revenues in the form of state aid./8 But, as a condition to eligibility for this aid for a given school year, *the board is required by law to hold school and provide actual instruction to students for at least 180 days during the school year* (ss. 121.02(1)(h), 121.17(2)(a), Wis. Stats.), which ends on June 30th (s. 115.01(6), Wis. Stats.).

Among the most important of the duties of policy making and management delegated by the legislature to local school boards are those pertaining to employment and dismissal of teachers (ss. 118.21, 118.22, Wis. Stats.) and to collective bargaining with them on questions of wages, hours and working conditions as required by s. 111.70, Wis. Stats., the Municipal Employment Relations Act (MERA). Under MERA, which is administered and enforced by the Wisconsin Employment Relations Commission (WERC), it is a prohibited practice for the employer school board to refuse to bargain collectively by meeting and conferring in good faith with respect to wages, hours and conditions of employment and with the intention of reaching an agreement, or to refuse to reduce any agreement arrived at to a written signed document. "The duty to bargain, however, does not compel either party to agree to a proposal or require the making of a concession," the legislature specifically recognizing, in creating MERA, "... that the public employer must exercise its powers and responsibilities to act for the

/7Town, Village and City Taxes — 1974 (Wisconsin Department of Revenue, Bull. Nos. 174, 274 and 374 combined, 1975), p. 54.

/8Comparative Analysis of Selected Characteristics, Wisconsin and Neighboring States (Wisconsin Department of Public Instruction, Bull. No. 5231, 1974).

government and good order of the municipality, its commercial benefit and the health, safety and welfare of the public to assure orderly operations and functions within its jurisdiction, subject to those rights secured to public employes by the constitutions of this state and of the United States and by this subchapter." s. 111.70(1)(d), Wis. Stats.

MERA specifically prohibits strikes by public employees. s. 111.70(4)(1), Wis. Stats. From 1962 through June of 1974, during which period the statutory strike prohibition was in effect,/9 there were 105 strikes against local municipal governments in Wisconsin, of which 44 were by public school teachers./10 According to another study for the same period, there were 254,126.5 man days lost due to strikes against Wisconsin local governments, 115,029.5 of which were attributable to teachers on strike./11

This, then, was the Wisconsin setting in the year 1974 when the Hortonville schools were closed by the teachers' strike.

II. The School Board Is A Proper Body To Decide Whether To Discharge Teachers Who Engage In An Illegal Strike Even Though The School Board Has Been Involved In Collective Bargaining With The Union Representing Those Teachers.

Relying primarily on *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, the Wisconsin Supreme Court found that teachers

/9The strike prohibition was enacted by ch. 633, 1961 Session Laws of the State of Wisconsin.

/10Fernbach, Public Employee Strikes in Wisconsin: 1962 to Present (Wisconsin Legislative Council Staff, Info. Memo 74-9, 1974), p. 3.

/11Verberkmoes, Strikes and Public Employee Strikes in Wisconsin, 1962-1974 (Wisconsin Association of School Boards, 1974), p. 2.

who were discharged for engaging in an illegal strike were denied due process of law because in hearing the matter the school board was not an impartial decision maker. It was the state court's view that procedural due process is not limited to the factual determination that the teachers were each engaged in the particular conduct charged, but requires "even in cases of undisputed or stipulated facts, that an impartial decision maker be charged with the responsibility of determining what action shall be taken on the basis of those facts." *Hortonville Education Association v. Hortonville Joint School District No. 1*, 66 Wis. 2d 469, 493, 225 N.W. 2d 658. The court *speculated* that the board's decision to discharge was "possibly a convenient alternative which would eliminate their labor problems in one fell swoop" (*Hortonville, supra* at 494) and held that the post-termination review procedures available under Wisconsin law would not ameliorate any partiality in the original decision because those procedures do not "provide for review to determine whether another course of action such as mediation, injunction, continued collective bargaining or arbitration would have been a more reasonable response on the part of the decision maker." even though the board "was undoubtedly faced with a situation that needed immediate attention" (*Hortonville, supra* at 496).

Based on its finding that a fundamental Fourteenth Amendment protection is involved in this case and that no adequate forum exists under state law to provide the constitutionally required independent decision maker, the court fashioned for Hortonville and for all public school boards in the state of Wisconsin a new remedy whereby when a public school teacher is discharged or otherwise disciplined and due process is required, and the board is in an adversary position, "the dissatisfied teacher or teachers can, upon petition, obtain a de novo determination of all issues in any court of record." *Hortonville, supra* at 498. The court is to resolve any factual dispute and provide for a reasonable disposition.

Amicus respectfully submits that a public school board charged with the important responsibility of operating the public schools, including the hiring and firing of teachers, should not be prohibited from carrying out these obligations merely because it also has a duty to bargain with the union which represents those teachers. It is further submitted that in spite of the fact that a school board is or has been engaged in collective bargaining with a union representing those teachers, it is a fair tribunal to decide whether to discharge teachers who engage in an illegal strike. In any event, in view of the need for expediency and because of the type of determination that has to be made, the school board as an administrative-governmental entity should appropriately decide what course of action to follow, not a court of law.

A. *The function of due process is not furthered by requiring that the decision to discharge striking teachers be made by a person or tribunal other than the public school district board.*

The commonly asserted purposes of due process are: (1) to assure that the facts on which the decision is based are correctly ascertained (1 Davis, Administrative Law Treatise, s. 7.01 (1958)); (2) to enable the individual to build a record which will permit meaningful judicial review of the administrative decision (*McGaugha v. California*, 402 U.S. 183, 268, 91 S.Ct. 1454 (Brennan, J., dissenting)); and (3) to prevent the appearance of unfairness (*Joint Antifascist Refugee Committee v. McGraff*, 341 U.S. 123, 171-172 and note 19, 71 S.Ct. 624 (Frankfurter, J., concurring); *Tumey v. Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437). The requirement of an impartial decision maker serves these functions of due process by providing a person or tribunal who will (1) fairly determine *relevant* facts, (2) permit the making of a fair record for review, and (3) prevent the appearance of unfairness.

A school board can adequately serve these functions in the type of case before this court for in cases where the question to be determined is whether or not the teachers have breached their employment contracts and engaged in an illegal strike, there are no difficult factual or legal questions for the board to decide. "The Board's sole objective in conducting the ... hearings is to ensure that innocent teachers were not mistakenly identified as strikers, and there is nothing in the record to indicate that the Board will not perform this duty fairly." *Lake Michigan College Federation of Teachers v. Lake Michigan Community College,* 518 Fed. 2d 1091, 1099 (6th Cir. 1975).

The Wisconsin Supreme Court found that procedural due process is constitutionally required when determining what course of action should be taken on the facts. *Amicus* will, in the next sub-part of this brief, submit that the court misinterpreted the purpose of the hearing; that although the determination of whether teachers were indeed engaged in an illegal strike may be subject to the requirements of procedural due process, the determination of what is to be done upon such a set of facts is not. Even if the premise of the Wisconsin Supreme Court is accepted, however, and the determination of what course of action is to be followed is one requiring procedural due process and an impartial decision maker, we submit that such requirements have been met.

The Wisconsin Court's decision turned on its holding that the school board was not an impartial decision maker. The fairness of the school board, however, should not be impugned because the board has been, or is, involved in bargaining with the union representing the striking teachers for, we submit, the combination of the duties to bargain and to hire and dismiss teachers involves no risk of bias in the constitutional sense. The State Supreme Court's speculation and assumption, without any support in the record, that discharge may have

been a convenient alternative to solve the board's labor problems is, *amicus* submits, neither supported nor justified. Under decisions of this court, improper motivation on the part of the school board having no factual support should not be inferred to disqualify the decision maker. Such an assumption does not "overcome a presumption of honesty and integrity in those serving as adjudicators." *Withrow v. Larkin,* 421 U.S. 35, 47, 95 S.Ct. 1456. Without facts to the contrary, school board members, like state administrators, should be "assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." *Withrow v. Larkin, supra* at 55 citing *U.S. v. Morgan,* 313 U.S. 409, 421./[12] We submit that it would have been more proper for the state court to have assumed in this case that any bias the school board may have held was in favor of reopening the schools which had been closed for a considerable time due to the unlawful strike.

B. The decision of the Wisconsin Supreme Court substantially alters the rights of striking teachers and the policy making function of the school board.

The purpose of the hearing is not and should not be to determine what course of action the board should take with

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/[12]Relevant to this point is the discussion of the New Hampshire Supreme Court found in *Farrelly v. Timberlane Regional School District,* — N.H. —, 324 A. 2d 723, 726 (1974):

> Plaintiffs' assertion that they were denied due process because the school board's prior involvement in the case rendered it impossible for them to act as an impartial decisionmaking body, is unsupported by any showing of actual bias or prejudice and it is well established that prior involvement in itself is not a sufficient ground to bar a statutory administrative body from acting as decisionmaker at an otherwise full and fair hearing.

respect to negotiations with the union representing the teachers, nor to determine at that point the course of action best designed to insure the restoration of the governmental function, i.e., the operation of the district schools. Those important decisions are to be determined apart from the hearing and will not be manifested in the form of an unfair decision against a teacher who did not participate in the strike. In this respect, we submit, the State Supreme Court erred when it held that not only the determination of whether or not an illegal strike occurred, and which of the teachers participated therein, must be made in conformity with the protections of procedural due process, but also what actions should appropriately be taken on the basis of such facts. This latter determination is not of a judicial nature. Rather, the school board, as the governmental entity in which school district policy making and managerial responsibilities are placed, must retain the discretion necessary to properly exercise its administrative function. *Amicus* submits that the state court in this case totally misconstrued the purpose of the disciplinary hearing.

In Wisconsin, public school teachers other than those employed in school districts in Milwaukee County, teach under a year-to-year contractual relationship with the school district. ss. 118.21, 118.22, Wis. Stats. The individual teacher contract is, however, subject to the right of the school board to discharge a teacher for just cause (*Millar v. Joint School District*, 2 Wis. 2d 303, 86 N.W. 2d 455 (1957)), and the Wisconsin Supreme Court in this case did find that, under Wisconsin law, discharge is a specific contractual remedy for engaging in an illegal strike (*Hortonville, supra* at 481). However, the court ruled (based on the impartial decision maker requirements of the due process clause) that when teachers engage in an illegal strike they may be discharged for such activity (which constitutes cause for discharge under the contract) only if a court, after the fact, agrees that this was the most reasonable response to the labor

dispute on the part of the school board. This results not only in teachers having greater rights that their counterparts in the private sector where strikers may engage in a legal strike and the employer has the right to replace, but also gives a teacher greater protection when engaging in an illegal strike than that afforded under other circumstances where the teacher may be discharged for cause during the term of the contract. *Amicus* submits that this judicial requirement is directly contrary to the public policy of the state of Wisconsin set forth in s. 111.70, Wis. Stats., which prohibits strikes by public employees, and was found necessary by the court solely because of its misapplication of the U.S. Supreme Court decisions on the impartial decision maker requirement of the due process clause of the U.S. Constitution.

The remedy fashioned by the state court extends to any situation where the school board is in an adversary position *viz a viz* the employee being considered for discharge and thus encourages the teacher/employee to make his public employer an adversary even in non-strike situations. We submit that such a result is clearly not in the public interest.

The decision of the state court also substantially alters the policy making role of the school board which has a mandatory duty to bargain with teachers and to employ and terminate teachers. The effect of the remedy as fashioned by the state court is that a board faced with the actuality of a continuing strike can no longer discharge teachers unless the board is willing to assume that every judge will agree that the discharge was the most reasonable course of action. We submit that striking teachers are dismissed so that replacement teachers may be hired and the operation of the schools restored. However, with the prospect of reinstatement and back pay upon a court later finding some alternative other than discharge a more reasonable response to the labor dispute, a school board will not dare to risk discharge and replacement.

Under the state court's decision, the only other alternative open to the school board to attempt to resolve the strike would be to first exhaust all other methods of strike resolution, including mediation, fact finding, continued bargaining, or seeking a court injunction, during which time the educational process is paralyzed, or at least severely disrupted. *Amicus* submits that this alternative falls short of adequately providing for the public's interest in the continuous and orderly operation of the public schools.

To repeat, the principal concern of a public school board faced with an actual work stoppage is to restore the operation of the important governmental service delegated to it with the shortest possible delay. In making the judgmental decision required to cope with an illegal work stoppage, the school board must consider a number of factors, including: the likelihood of prompt, judicial relief if an injunction is sought; the likelihood of the teachers abiding by a judicial order; the likelihood of effective services by teachers who return to work under court order; the likelihood of rapid resolution of the dispute through collective bargaining, mediation, or other statutory impasse procedures; and the availability of replacement teachers. As elected public officials, boards of education have a concern for their responsibility to serve their community and for their duty to provide for an educational program. They must be permitted to take appropriate and rapid action in the best interest of the school district. To require, that with a strike in progress, the school board must exhaust all other alternatives before resorting to discharge would have a most serious and detrimental effect on the operation of local public schools throughout the state of Wisconsin.

Amicus submits that the importance of public education cannot be overstressed. This court has stated that in today's world a public elementary and secondary education is viewed

as a necessity./[13] In addressing the due process to be accorded to a student suspended from school for a 10 day period, this court stated in *Goss v. Lopez,* 419 U.S. 565, 576, 95 S.Ct. 729:

> ". . . the total exclusion from the educational process for more than a trivial period, and certainly if the suspension is for 10 days, is a serious event in the life of the suspended child."

C. Due process does not require this result.

The due process clause does not create substantive rights in property. Rather it insures of procedures to protect existing rights. "The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits." *Board of Regents v. Roth,* 408 U.S. 564, 576, 92 S.Ct. 2701. Similarly, the requirement of an impartial decision maker is not meant to be a grant of substantive rights. Rather, it is part of a complex of procedures to insure against wrongful deprivation of existing rights.

The role of the decision maker on termination of government employment is, we submit, to apply an existing standard for discharge. The government employer, when hearing or deliberating upon discharge, is not called upon and should not be required to consider and make policy decisions with respect to matters other than cause for discharge that may well fall within the scope of its governmental functions. Similarly, the role of the judiciary on review of such a decision should be to

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/[13]"Today, education is perhaps the most important function of state and local governments. ... It is the very foundation of good citizenship ... In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Brown v. Board of Education,* 347 U.S. 483, 493, 74 S.Ct. 686.

determine whether existing standards were fairly applied and should not be to select policy or change decisions permitted to the school board in the exercise of discretion or judgment./[14]

Nor does the due process clause require that the policy making function of the school board be changed.

> ". . . consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by the governmental action." *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743.

In balancing the interests involved here there is to be considered on the employee's side the deprivation of loss of income and the cloud on employability resulting from the dismissal./[15] However, in this case the employees involved

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/[14]Cf. *Wood v. Strickland*, 420 U.S. 308, 326, 95 S.Ct. 992:

> It is not the role of the federal court to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion ... The system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members. ...

/[15]Cf., however, the discussion found in *Lake Michigan College Federation of Teachers v. Lake Michigan Community College*, 518 F. 2d 1091, 1097 (6th Cir. 1975):

> In the case at hand, the teachers were accused of violating Michigan's no-strike law, and we fail to see how this allegation discredited their honesty, morality, and integrity or damaged their standing in the community. The PERA provides no criminal penalties for illegal strikes. Furthermore, through their pickets and placards the teachers openly announced the fact that they were on strike. *Apparently they did not believe that their conduct was dishonest or immoral or that it would seriously damage their reputation in the community.* (emphasis added)

were already openly engaged in an illegal strike and therefore already experiencing a loss of income. Furthermore, the notice which informed the striking teachers of their discharge invited them to reapply for their postions.

Amicus submits that the teachers' interest in a procedure providing for an impartial decision maker has value only to the extent that it guards against harmful partiality. Given the correct nature of a discharge hearing there is no danger of harmful partiality on the part of the school board when no factual dispute is involved and the application of the rule of law is not intertwined with factual issues, for in such a setting the interest of the teachers would not be significantly furthered by having a person or tribunal other than a school board decide the question of the existence of cause for discharge.

On the other hand, the public's interest in permitting the school board to make this decision is most weighty. The rule of necessity applies in that there is no other body available to make the decision. Further, there is a significant difference between the requirement of an independent decision maker and other procedural due process requirements in that only the former threatens the agency's ability to effectively implement its policy. While other procedural requirements have been found not to offset the individual's interest solely because they may increase expense or cause delay, they do not alter the fundamental nature of the governmental agency.

The literal meaning of the Wisconsin Supreme Court's decision is that elected officials are barred by the due process clause of the federal constitution from carrying out a most important part of the duties which the Wisconsin legislature has delegated to them, for as a result of the decision an elected school board cannot at the same time exercise the two functions of bargaining with employees and terminating their employment in the event the employees engage in conserted unlawful activity. The constitution has not, and should not be construed by this court to prohibit such a logical grouping of governmental functions in the school board.

In most, if not all cases of school and municipal employment in Wisconsin the governing body will be involved in collective bargaining and will become directly involved when negotiations reach the impasse stage. For a court to prohibit an elected school board from performing its statutory duties to evaluate and terminate teachers in those instances where it also is or has been engaged in fulfilling its duty as the governmental employer to bargain collectively with the teachers, poses, *amicus* submits, a grave threat to responsive representative government and local lay control of education. The challenge to the combination of functions such as is involved in this case "assumes too much and would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity." *Richardson v. Perales*, 402 U.S. 389, 410, 91 S.Ct. 1420; *Withrow v. Larkin*, 421 U.S. 35, 49-50, 95 S.Ct. 1456.

In summary, *amicus* respectfully submits that the combination of functions here involved is a logical grouping in the public school board and ought to be determined by this Court to be constitutionally antiseptic for there is no significant interest of striking teachers which would be served by separation of these functions. On the other hand, retention of these combined functions is most important since they lie at the core of the governmental function of the school board. Judicial divestment of one of these legislative functions from the school board in the setting of this case would, we submit, have the deleterious result of diminishing the necessary qualities of responsiveness and representative government and would particularly threaten local lay control of public school education. The Wisconsin Supreme Court recognized but did not adopt this argument when it stated that its disposition of the case was not ideal because the court under the remedy fashioned "may be required to make public policy decisions that are better left to a legislative or administrative body." *Hortonville, supra* at 498.

III. Even If It Is Not An "Impartial Tribunal," The Decision Of A Wisconsin School Board To Discharge Striking Teachers Would Not Violate Due Process.

Assuming that the school board does not meet constitutional tests of a fair tribunal in discharging teachers who are engaged in an illegal strike, because it has previously engaged in collective bargaining with the union representing those teachers, the school board may, nevertheless, discharge the striking teachers without violating their rights to due process.

A. Due process does not require that a decision to terminate interests in public employment be made by an impartial decision maker where post-termination review procedures before an impartial decision maker are available to the terminated employee.

In *Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, this court held that the due process guarantee of the Fourteenth Amendment may not be offended where a public employee is initially discharged by a biased decision maker. In *Arnett* a non-probationary federal employee entitled under the Lloyd-LaFollette Act (5 U.S.C. s. 7501), not to be discharged except for cause was dismissed without a trial-type hearing by a superior official whom he had allegedly defamed. It was assumed that this official was not an impartial decision maker. Nonetheless, a majority of this court found no violation of due process. This holding was supported by two opinions and two rationale. In an opinion written by Mr. Justice Rehnquist, an impartial

decision maker was found not to be required because it was not provided for by statute (*Arnett, supra* at pp. 155-156, note 21); an opinion by Mr. Justice Powell, on the other hand, suggested that, on balancing the interests involved, a pre-termination "hearing" before an impartial decision maker was not constitutionally required where the employee was entitled to a full evidentiary hearing before an impartial decision maker after removal, with the right to reinstatement and back pay if the discharge is found to be improper (*Arnett, supra* at p. 170, note 5). Thus at least in those instances where a post-termination evidentiary hearing is available to the discharged employee, with the right to reinstatement and back pay if the discharge is found to be improper, due process does not require an impartial decision maker at the pre-termination level.

Assuming that the school board is not an impartial tribunal, the present case is directly analogous to *Arnett*. The Wisconsin Supreme Court found that the discharge deprived the striking teachers of liberty and property interests. However, with respect to the liberty interests, the purpose of the due process hearing is to allow the charged person an opportunity to clear his name. *Board of Regents v. Roth*, 408 U.S. 564, 573, footnote 12, 92 S.Ct. 2701. A pre-termination hearing is not required:

> ". . . that liberty is not offended by dismissal from employment itself, but instead by dismissal based upon an unsupported charge which could wrongfully injure the reputation of an employee. Since the purpose of the hearing in such a case is to provide the person 'an opportunity to clear his name,' a hearing afforded by administrative appeal procedures after the actual dismissal is a sufficient compliance with the requirements of the Due Process Clause." *Arnett, supra* at 157.

In this case the property interests of the discharged teachers arose by virtue of their teaching contracts. Neither the statutes providing for the teaching contract and rights

under the contract (ss. 118.21, 118.22, Wis. Stats.), nor the contract itself provide for an independent decision maker upon discharge under the contract. In addition, state law provides for various forms of post-termination review of the discharge before an independent decision maker who, upon a determination that discharge was improper, may order back pay and/or reinstatement.

B. Post-termination review procedures before an impartial decision maker, available to the discharged teachers under state law, adequately protect their interest.

(1) Action for Breach of Contract.

The contractual relationship between a teacher and the school board provides the teacher with job security in the form of employment during the contract term absent sufficient cause for discharge. A teacher who feels that he or she was wrongfully dismissed during the contractual term may institute an action for breach of contract in the state circuit or county court. An action for breach of contract involves a full evidentiary hearing before an independent judicial decision maker with respect to all issues of fact and law concerning whether or not there was sufficient cause for termination of the employment contract. *Millar v. Joint School District 2*, Wis. 2d 303, *supra*.

(2) Review by Common Law Writ of Certiorari

In addition, the discharged teachers can have all issues concerning the validity of the discharge proceeding, as well as the existence of cause for discharge, judicially reviewed by

petition for a writ of certiorari. In Wisconsin, a writ of certiorari is a common law writ issuable by courts of record in the exercise of their superintendent or supervisory control over lower judicial tribunals and quasi-judicial boards and commissions. It is available to review final determination of all tribunals including school boards acting in a quasi-judicial capacity wherever there is no statutory provision for judicial review. *State ex rel. Johnson v. Cady*, 50 Wis. 2d 540, 549-550, 185 N.W. 2d 306 (1971). The scope of review on certiorari extends to: (1) whether the agency exceeded its jurisdiction, (2) whether it correctly applied applicable law, (3) whether the action of the agency or board was arbitrary, oppressive or unreasonable and represented its will and not its judgment, and (4) whether the evidence was such that the agency might reasonably make the order or determination in question. *State ex rel. Ball v. McPhee*, 6 Wis. 2d 190, 199, 94 N.W. 2d 711 (1959); *State v. Goulette*, 65 Wis. 2d 207, 222 N.W. 2d 622 (1974) (cited in *Hortonville, supra* at 496).

(3) Review by WERC

Wisconsin statutes provide that it is a prohibited practice for municipal employers to violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employees. s.111.70 (3) (a) 5, Wis. Stats. At the time of discharge of the striking teachers in this case, "the power of the board to discharge a teacher for 'just cause' was clearly preserved in the master contract between HEA and the school district." *Hortonville, supra* at 481. Thus, under s. 111.70 (3) (a) 5 the striking teachers had the right to a post-discharge evidentiary hearing before the WERC with respect to whether or not their discharge was for "just cause."

In addition, the matter suggested by the Wisconsin Supreme Court as a possible motive of the school board for dismissing the striking teachers, that is to avoid their

obligation to bargain with the union representing the teachers, is an independent prohibited practice under state law. It is a prohibited practice for a municipal employer to interfere with, restrain or coerce municipal employees in the exercise of their rights to self organization, to form, join or assist a labor organization, to bargain collectively through representatives of their own choosing and to engage in lawful concerted activities for the purpose of collective bargaining or other mutual aid and protection. ss. 111.70 (3) (a) 1, 111.70 (2), Wis. Stats. It is also a prohibited practice for a municipal employer to refuse to bargain in good faith with the collective bargaining representative of municipal employees. s. 111.70 (3) (a) 4, Wis. Stats. Under these sections, a complaint alleging that the striking teachers were discharged in derogation of their right to organize and engage in collective bargaining is independently reviewable by the WERC.

Upon a finding by the WERC that striking teachers were discharged in violation of the collective bargaining agreement or in derogation of their rights to organize and bargain collectively, the WERC may order reinstatement and back pay. ss. 111.70 (4) (a), 111.07 (4), Wis. Stats. See also *Muskego-Norway C.S.J.S.C. No. 9 v. WERB*, 35 Wis. 2d 540, 151 N.W. 2d 617 (1967).

C. The Wisconsin Supreme Court failed to consider the adequacy of an action for breach of contract and incorrectly found review by certiorari or the WERC inadequate.

Although the issue was raised, the Wisconsin Supreme Court failed to consider the adequacy of an action for breach of contract as a method of post-termination review before an independent and impartial decision maker. Further, the court found review by certiorari and by the WERC inadequate

because neither of these alternatives provide, on review, for an independent decision maker determination of whether another more reasonable course of action such as mediation, injunction, continued collective bargaining or arbitration, should have been the response to the strike on the part of the decision maker. *Hortonville, supra* at 496. *Amicus* respectfully submits that post-termination review need not and should not include such a determination. The existing post-termination review procedures available to discharged public school teachers adequately protect their constitional rights and interests.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. 74-1606

October Term, 1975.

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; BOARD OF EDUCATION OF HORTONVILLE JOINT SCHOOL DISTRICT NO. 1 ROGER WEIHING, ROBERT HAUK, JEAN MEADS, FLOYD MEYER, MERLIN PLAMANN, VICTOR SCHROTH and RONALD SURPRISE, individually and as officers and members of the Board of Education of Hortonville Joint School District No. 1; and MARVIN OBRY, ROBERT KOHLS and GENE RIEDL, individually and as administrators of Hortonville Joint School District No. 1,

Petitioners,

v.

HORTONVILLE EDUCATION ASSOCIATION and MICHAEL WISNOSKI, ROSE MARIE OLSON, THOMAS NADEAU, JUDY MURPHY, RUSSEL LICHTE and RONALD HAMMOND,

Respondents.

Amicus Curiae Brief on Behalf of County of Broome, State of New York.

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In the

Supreme Court of the United States

October Term, 1975.

No. .....

Hortonville Joint School District No. 1; Board of Education of Hortonville Joint School District No. 1; Roger Weihing, Robert Hauk, Jean Meads, Floyd Meyer, Merlin Plamann, Victor Schroth and Ronald Surprise, individually and as officers and members of the Board of Education of Hortonville Joint School District No. 1; and Marvin Obry, Robert Kohls and Gene Riedl, individually and as administrators of Hortonville Joint School District No. 1,

Petitioners,

v.

Hortonville Education Association and Michael Wisnoski, Rose Marie Olson, Thomas Nadeau, Judy Murphy, Russel Lichte and Ronald Hammond,

Respondents.

Amicus Curiae Brief on Behalf of County of Broome, State of New York.

Statement of Interest.

The County of Broome is a municipal corporation organized and existing under the laws of the State of New York. Pursuant to the laws of the State of New York, Broome County is the public employer of teachers at Broome Community College. These teachers are pro-

hibited from striking by state law, but this prohibition does not necessarily prevent strikes. In the event of a protracted strike, the County of Broome would be confronted with the Hortonville dilemma. Education would come to a halt at Broome Community College for as long as the whims of the teachers dictated and not only would the students be without education, but also the County would have to pay administrative costs and refund tuition. In light of the County's obligation to provide community college education, the only feasible alternative to an illegal protracted work stoppage may well be to give notice to the teachers that unless they return to their educational duties they will be replaced after a hearing before the County's Excutive Officer, subject to review by the courts of this state. The Hortonville case reaches that issue.

Summary of Argument.

The Constitution does not guarantee the right to strike and the rationale for prohibiting strikes in the public sector is based upon sound reasoning. Governments have a legitimate interest in prohibiting strikes by their employees. Anti-strike laws with respect to governmental employees are common in the United States. Both Federal and state courts have recognized this legitimate interest. Strikes in the public sector have crippled essential services and can cause substantial injury to the public health, safety and welfare. Governments cannot go out of business, and priorities of governmental services should be established by the legislature rather than by the relative brute force of respective unions. Striking is neither an asoblute nor relative right in the public sector. The Constitution does not guarantee an absolute right to strike, and, on a balancing of interests, the government has at paramount interest in prohibiting strikes by public employees.

Procedural due process is not violated when a public officer-employer acts as a hearing officer on the issue of striking employees. This is even more true when the hearing is subject to a judicial review. Procedural due process is a many faceted concept. The range of rights depends on a balancing of interest. The only rights governmental employees have to their positions were created by the same statute which delimited these rights by specific procedures. The paramount interest of the state to regulate labor relations with its own employees is fundamental and a valid exercise of its police powers. Federal regulation of state employees labor relations is conspicuously absent. Even assuming Federal due process applies to hearings on striking governmental employees, an in-house hearing officer is not inherently biased and such decisions are subject to judicial review. Furthermore, in balancing the governmental interests with the employees rights, the government's interests are paramount.

POINT I.

Neither the 14th Amendment nor the 5th Amendment to the Federal Constitution give public employees the substantive right to strike.

The constitutionality of anti-striking laws has withstood challenged in both the Federal and state courts. These laws are based upon thoroughly reasoned public policy and are common in the public sector in the United States. For example employees of the United States Government (18 U.S.C. Section 1918), governmental employees in the State of Wisconsin (1 Wisc. Stat. Section 111.70[4][1]), and governmental employees in the State of New York (9 Civil Service Law Section 210) are prohibited from engaging in a strike. Similar pro-

hibitions against strikes are found in other states (see generally, Labor Law: Right of Public Employees to Strike or Engage in Work Stoppage, James Duff, 37 ALR 3rd 1147). The constitutionality of the strike prohibitions has been uniformly upheld.

Federal courts have recognized the interests of government in regulating strikes in both the private and public sector. At the dawn of labor organizing in the United States, Justice Brandeis delimited the right to strike and the power of the courts to enjoin illegal strikes in the case of *Dorchy v. Kansas,* 272 U. S. 306 (1926):

> "Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike." 272 U. S. at 311.

Thereafter strikes in the private sector received limited protection by the National Labor Relations Act (49 Stat. 449, 452 [1937]). Yet some strikes in the private sector remain illegal; for example, the Supreme Court has held that a sit down strike in the private sector remains illegal and constitutes adequate cause for discharge. *Labor Board v. Fansteel Corp.,* 306 U. S. 240, 256 (1939). In the public sector, discharge should also be a permissible remedy of the employer for violations of specific statutory provisions against striking, and the Federal and state courts have so held.

Federal courts have considered the prohibition against striking in the public sector. The Supreme Court has cited Federal anti-striking provisions while district courts have passed upon the constitutional objections and enjoined striking governmental employees. In 1966 the Supreme Court cited the prohibition of governmental employees to strike in the case of *Amell v. U. S.,* 384 U. S. 158 (1966). However, the case involved jurisdictional

questions and not the constitutionality of the Federal statutes prohibiting strikes.

The leading case on the anti-striking provisions with respect to Federal employees is the *United Federation of Postal Clerks v. Blount,* 325 F. Supp. 879 (D.C. D.C. 1971). The court found that there is no constitutional right to strike and that:

> "Given the fact that there is no constitutional right to strike, it is not irrational or arbitrary for the Government to condition employment on a promise not to withhold labor collectively and to prohibit strikes by those in public employment, whether because of the prerogatives of the sovereign, some sense of higher obligation associated with public service, to assure the continuing functioning of the government without interruption, to protect public health and safety or for other reasons." 325 F. Supp. at 883.

The court found that neither the common law nor the constitution guarantees the right to strike:

> "At common law no employee, whether public or private, had a constitutional right to strike in concert with his fellow workers." 325 F. Supp. at 882.

Considering constitutional objections:

> "Furthermore, it should be pointed out that the fact that public employees may not strike does not interfere with their rights which are fundamental and constitutionally protected." 326 F. Supp. at 883.

The rationale for prohibition against strikes by government employees was capsulized by the court:

> "Congress has an obligation to ensure that the machinery of the Federal Government continues to

> function at all times without interference. Prohibition of strikes by its employees is a reason for implementation of that obligation." 325 F. Supp. at 884.

Governmental employees not only owe unique obligation to the sovereign in that the operations of government are considered so essential as to be assumed by the government rather than private business, but also are not subject to the same market forces as the private sector. Absent unique powers of governments to prohibit strikes, there is no adequate limitation on wage demands except taxing limitations, while in the private sector wage demands are constrained by competitive forces. While some have argued that a judicial determination should be made with respect to what services are "essential" and a priori should be given the right to strike, this categorization is a fundamental legislative power and should not be disturbed when there is a rational basis for such determination.

Recognizing the legitimate concerns of government to prohibit strikes, the Federal courts have enjoined illegal activities. For example, in *Tennessee Valley Authority v. Local Union No. 110 Of Sheet Metal Workers International Association of Louisville, Kentucky,* 333 F. Supp. 997 (D. C. Ky. 1962), illegal picketing was prohibited. See also *U. S. v. Branch 16 National Association of Letter Carriers, AFL-CIO,* 312 F. Supp. 619 (D. C. Conn. 1970), and *U. S. v. Professional Air Traffic Controllers Organization,* 438 F. 2d 79 (C. A. N. Y.), cert. den. 402 U. S. 915 (1970).

Similarly state courts have recognized the right of public employers to prohibit strikes. For example, the leading case in New York is *City of New York v. DeLury,* 23 N. Y. 2d 175 (1969). The court categorically rejected

the constitutional arguments. Speaking for the court in an unanimous opinion Chief Justice Fuld first found no due process violations:

> "Manifestly, neither the Fourteenth Amendment to the Federal Constitution nor the Bill of Rights of the State Constitution (Art. I) grants to any individual an absolute right to strike. On the contrary, that right is subject to the qualification that, if a strike is for an illegal objective, it is enjoinable at the instance of an aggrieved party." 23 N. Y. 2d at 181.

Second, Justice Fuld set forth the public policy upon which this prohibition is based:

> "Quite obviously, the ability of the Legislature to establish priorities among government services would be destroyed if public employees could, with impunity, engage in strikes which deprive the public of essential services. The striking employees, by paralyzing a city through the exercise of naked power, could obtain gains wholly disproportionate to the services rendered by them and at the expense of the public and other public employees. The consequence would be the destruction of democratic legislative processes because budgeting and the establishment of priorities would no longer result from the free choice of the electorate's representatives but from the coercive effect of paralyzing strikes of public employees." 23 N. Y. 2d at 183.

New York State has also rejected arguments based upon constitutional provisions granting equal protection under the laws. For example in *Rankin v. Shanker,* 23 N. Y. 2d 111 (1969), the court stated:

> "Ever since the enactment of the Norris-LaGuardia Act and our state's Little Norris-LaGuardia Act, the view has been uniformly and consistently

held that a legitimate distinction between public and private employment is constitutionally permissible." 23 N. Y. at 116.

Other states have expressly or by clear implication upheld the constitutionality of anti-striking provisions. For example, *Norwalk Teachers Association v. Board of Education,* 138 Conn. 269 (1951); *Wilmington v. General Teamsters Local Union,* 290 A. 2d 8 (Del. 1972); *American Federation of State, County, and Municipal Employees v. Fort Lauderdale,* 273 So. 2d 441 (Fla. 4th Dist. 1973); *International Longshoremen's Association v. Georgia Ports Authority,* 217 Ga. 712 (1962), cert. den. 370 U. S. 922 (1962); *Detroit v. Amalgamated Association of Street, etc.,* 332 Mich. 257, app. dismd. 344 U. S. 805 (1952); *Head v. Special School District,* 288 Minn. 496, cert. denied 404 U. S. 886 (1971); *Grandview v. Moor,* 481 S. W. 2d 555 (Mo. 1972); *Cleveland v. Division 268 of Amalgamated Assn.,* 41 Ohio Op. 236 (1949), and *South Atlantic and Gulf Coast District v. Harris County—Huston Ship Channel Navigation District,* 358 S. W. 2d 658 (Tex. 1962), cert. denied 372 U. S. 975.

POINT II.

Hearings before a public officer-employer on charges of illegal strike activities by employees do not violate procedural due process.

An employer has the basic right to hire and fire absent contractual, statutory or constitutional prohibitions to the contrary. A public employer has the additional obligation to provide essential services such as education. Interruptions in the education of students by striking teachers is not a mere emotional cry of heated condemnation but also a reality. In the City of New York protracted teachers' strikes have irreparably set back the education of students. School boards have the unique obligation of assuring the public that education of students is not interrupted. In the first instance school boards should also take all necessary and reasonable steps to provide that education. Accordingly most states have prohibited strikes, see Point I, *supra,* and have given school boards or their chief executive officer broad powers to deal with strikes (e. g., 9 Civil Service Law Section 210 [2] [d] New York).

The scope of procedural due process afforded striking government employees depends upon the deference of the Federal government and Federal courts to states which have established substantive and procedural labor relations of its own employees, and a balancing of the interests of government with the interests of governmental employees. Procedural due process is an elusive term. Depending on balancing of interests involved, due process requirements can range from the right to a pre-termination hearing (e. g., *Goldberg v. Kelly,* 397 U. S. 254 [1970]) to an arbitrary and capricious refusal to rehire a non-tenured teacher by an administrator-employer without a hearing or without stating any reasons (*Board of Regents v. Roth,* 408 U. S. 564 [1972]).

Common sense of justice and flexibility permeate the concept of due process. This principle can be extrapolated from the case of *Cafeteria Workers v. McElroy,* 367 U. S. 886, 895 (1961):

> "The very nature of due process negates any concept of inflexible procedures universally applicable in every imaginable situation."

Due process must also be considered in light of the statutory rights created for public employees. Justice Renh-

quist capsulized the conundrum of the public employer in *Arnett v. Kennedy,* 416 U. S. 134 (1974):

> "For almost the first century of our national existence, federal employment was regarded as an item of patronage, which could be granted, withheld, or withdrawn for whatever reason might appeal to the responsible executive hiring officer." 416 U. S. at 148.

Federal legislation subsequently established civil service rights for employees and the states followed this action. Attendant with these rights were removal procedures. Bifurcating the legislative intent was the conundrum of which Justice Renhquist wrote:

> "Only by bifurcating the very sentence of the Act of Congress which conferred upon appellee the right not to be removed save for cause could it be said that he had an expectancy of that substantive right without the procedural limitations which Congress attached to it. In the area of federal regulation of government employees, where in the absence of statutory limitation the governmental employer has had virtually uncontrolled latitude in decisions as to hiring and firing." 416 U. S. at 152.

The role of the Federal courts in reviewing state regulations is more limited than of Federal regulations which is another reason why the Federal courts should defer to state legislatures with respect to establishment of substantive rights and procedural remedies in this area. Deference to state regulation for the public welfare was recognized by the Supreme Court in *Nebia v. New York,* 291 U. S. 502 (1934):

> "The Fifth Amendment, in the field of Federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exercise of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guarantee of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." 291 U. S. at 525.

Anti-striking laws serve a legitimate governmental purpose and cannot be said to be totally unreasonable, arbitrary or capricious in light of the legitimate governmental purpose served by them. In granting public employees civil service protection or tenure the government has a legitimate interest in establishing procedures to protect itself and the public from illegal activities which prevent the government from providing essential services. Recognizing that the Constitution does not protect unbridled activities that cause substantial public injury, the court in *Nebia, supra,* noted:

> "The Constitution does not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of people." 291 U. S. 502, 538-39).

The states' rights to broadly regulate terms and conditions of employment, minimum wages and maximum commissions to employment agencies have been recognized by the Supreme Court. As Justice Douglas noted in the case of *Olson v. Nebraska, ex rel. Western Reference and Bond Association,* 313 U. S. 236 (1941):

> "We are not concerned, however, with the wisdom, need, or appropriateness of the legislation. Differences of opinion on that score suggest a choice which 'should be left where * * * it was left by the Constitution—to the States and Congress.'" 313 U. S. at 246.

The states' interests in regulating its own employees is even more compelling. A fortiori the wisdom, need or appropriateness of legislation prohibiting strikes by public employees and setting forth procedures for strike violators should not be disturbed. If the federal government does not prohibit industry from replacing employees on an illegal strike, *Labor Board v. Fansteel Corporation,* 306 U. S. 249, 256 (1939), states and their subdivisions should have even broader powers in light of the 10th Amendment to the Federal Constitution and the conspicuous absence of Federal regulation of state labor relations.

Even assuming that state anti-strike laws are subject to Federal due process, there are compelling reasons for the public employer to make initial determinations which are subject to review in the courts. The mere fact that an employer passes on a decision with respect to activities of its employees does not violate due process. In *Arnett, supra,* where the hearing officer was a slandered supervisor, the Supreme Court in a majority decision held that the slandered supervisor could be the hearing officer in a pre-termination hearing. In that same decision Justice White recognized that a public officer can make determinations concerning public employees directly under his supervision:

> "Fairness and accuracy are not always threatened simply because the hearing examiner is the supervisor of an employee." 416 U. S. 134, 199.

Nor where decisions are reviewable, due process does not require administrative hearings to be judicial or quasi-judicial. For example, in *Goldberg, supra,* Justice Brennan noted:

> "(T)he pre-termination hearing need not take the form of a judicial or quasi-judicial trial." 397 U. S. 254, 266.

Similarly Justice Stuart in delivering the opinion in *Board of Regents v. Roth,* 408 U. S. 564 (1972), refused to disturb a state law on tenure which permitted school administrators to refrain from rehiring nontenured teachers.

Assuming public employees are entitled to an initial determination of whether they are on strike, whether that determination must be made by the courts rather than by the public employer depends upon a balancing of interest in light of the realities. An analogy to the balancing test advanced by Justice Powell in the *Arnett* decision sheds light on the factors which should be considered in school district hearings. Justice Powell succinctly set forth the test to be applied:

> "The resolution of this issue depends on a balancing process in which the government's interest in expeditious removal of an unsatisfactory employee is weighed against the interest of the affected employee in continued public employment." 416 U. S. 134, 167-68.

In a school district the "rights" of the teacher to maintain their tenured positions while engaging in a protracted strike must be balanced with the school district's interest to provide uninterrupted education. Justice Powell in *Arnett, supra,* found the government's interest to be paramount:

> "(T)he Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogatives to remove employees whose conduct hinders efficient operation and *to do so with Dispatch. Prolonged retention of disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale* in the work place, foster

> disharmony, and ultimately impair the efficiency of an office or agency. Moreover, a requirement of a prior evidentiary hearing would impose additional administrative costs, create delay, and deter warranted discharges. Thus, the Government's interest in being able to act expeditiously to remove an unsatisfactory employee is substantial." 416 U. S. 134, 168. (Italics added.)

Similarly a school district should have wide discretion and control over striking employees. This discretion should include the prerogative to remove striking employees whose conduct hinders efficient operations of the school district and to do so with dispatch. Procrasted solutions would be disruptive to the school system and create disharmony, morale and discipline problems not only with other teachers but also would engender the same spirit of rebellion among students. A school board hearing is also much more economical. Accordingly the school district's interest in being able to act expeditiously is paramount.

School administrators are not inherently biased against teachers. Often times administrators have worked their way through the academic ranks and themselves were teachers. School districts are more interested in providing education than replacing an entire staff that is out on strike. When a protracted strike has occurred, further interruption in the students' education should not be delayed by a judicial hearing in which the court will inevitably and inextricably become involved with the negotiating process. Courts should play an active role in review of the procedures to insure fundamental due process, but only school boards are capable of minimizing the disruptive interruptions in the educational process attendant with strikes. Members of school boards are public officers and there should be no presumption that they are incapable of making unbiased decisions with respect to the people

they supervise. In the event of a biased, arbitrary or capricious decision adequate judicial review is available.

New York State has specifically considered the question of an in-house hearing officer to consider penalties for striking employees. On remand from the United States Supreme Court in light of the *Arnett* case, *supra,* the New York State Court of Appeals in the case of *Sanford v. Rockefeller,* 35 N. Y. 2d 547 (1975), in rejecting arguments that executive officers are inherently biased and their decisions violate due process stated:

> "It is further argued that * * * a post-penalty hearing will only be held at the unfettered discretion of the reviewing officer. The short answer to that is that the officer's discretion is, rather, open to review. His determination summarily rejecting the excuses contained in the employee's affidavit is subject to Article 78 review as specifically provided for in Paragraph (h) of subdivision 2." 35 N. Y. 2d at 562.

In short, the answer to clamors of impartiality to employer-hearing officer decisions is met by post-hearing judicial review by state courts.

Conclusion.

Substantive due process does not guarantee public employees the right to strike. Labor relations of governmental employees should be left to the broad discretion of the respective governmental employers. In balancing the relative interest of the public employee with the public employer, procedural due process is not violated when a public officer-employer makes a determination with respect to employees who withheld their services. State

court review of these determinations vitiates any arguments of violations of procedural due process.

Respectfully submitted,

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APPENDIX.

18 U.S.C. Section 1918.

18 U.S.C. Section 1918 Provides:

Whoever violates the provision of Section 7311 of Title 5 that an individual may not accept or hold a position in the Government of the United States or the government of the District of Columbia, if he • • •

> (1) participates in a strike, or asserts the right to strike, against the Government of the United States or the government of the District of Columbia; • • •

shall be fined not more than $1,000 or imprisoned not more than one year and a day, or both.

---

1 Wisconsin Statute Section 111.70 (4)(1) (1973).

1 Wisconsin Statute Section 111.70 (4) (1) (1973) provides: *"Strikes prohibited.* Nothing contained in this subchapter shall constitute a grant of the right to strike by any county or municipal employee and such strikes are hereby expressly prohibited."

9 Civil Service Law, §210 (New York, McKinney).

Prohibition of strikes

1. No public employee or employee organization shall engage in a strike, and no public employee or employee organization shall cause, instigate, encourage, or condone a strike.

2. Violations and penalties; presumption; prohibition against consent to strike; determination; notice; probation; payroll deductions; objections; and restoration. (a) Violations and penalties. A public employee shall violate this subdivision by engaging in a strike or violating paragraph (c) of this subdivision and shall be liable as provided in this subdivision pursuant to the procedures contained herein. In addition, any public employee who violates subdivision one of this section may be subject to removal or other disciplinary action provided by law for misconduct.

(b) Presumption. For purposes of this subdivision an employee who is absent from work without permission, or who abstains wholly or in part from the full performance of his duties in his normal manner without permission, on the date or dates when a strike occurs, shall be presumed to have engaged in such strike on such date or dates.

(c) Prohibition against consent to strike. No person exercising on behalf of any public employer any authority, supervision or direction over any public employee shall have the power to authorize, approve, condone or consent to a strike, or the engaging in a strike, by one or more public employees, and such person shall not authorize, approve, condone or consent to such strike or engagement.

(d) Determination. In the event that it appears that a violation of this subdivision may have occurred, the

chief executive officer of the government involved shall, on the basis of such investigation and affidavits as he may deem appropriate, determine whether or not such violation has occurred and the date or dates of such violation. If the chief executive officer determines that such violation has occurred, he shall further determine, on the basis of such further investigation and affidavits as he may deem appropriate, the names of employees who committed such violation and the date or dates thereof. Such determination shall not be deemed to be final until the completion of the procedures provided for in this subdivision.

(e) Notice. The chief executive officer shall forthwith notify each employee that he has been found to have committed such violation the date or dates thereof and of his right to object to such determination pursuant to paragraph (h) of this subdivision; he shall also notify the chief fiscal officer of the names of all such employees and of the total number of days, or part thereof, on which it has been determined that such violation occurred. Notice to each employee shall be by personal service or by certified mail to his last address filed by him with his employer.

(f) Probation. Notwithstanding any inconsistent provision of law, any public employee who has been determined to have violated this subdivision shall be on probation for a term of one year following such determination during which period he shall serve without tenure; provided, however, that the effect of probation hereunder with regard to teachers and others subject to the education law shall not exceed or differ from the effect of probation hereunder with regard to other public employees.

(g) Payroll deductions. Not earlier than thirty nor later than ninety days following the date of such determination, the chief fiscal officer of the government in-

volved shall deduct from the compensation of each such public employee an amount equal to twice his daily rate of pay for each day or part thereof that it was determined that he had violated this subdivision; such rate of pay to be computed as of the time of such violation. In computing such deduction, credit shall be allowed for amounts already withheld from such employee's compensation on account of his absence from work or other withholding of services on such day or days. In computing the aforesaid thirty to ninety day period of time following the determination of a violation pursuant to subdivision (d) of paragraph two of this section and where the employee's annual compensation is paid over a period of time which is less than fifty-two weeks, that period of time between the last day of the last payroll period of the employment term in which the violation occurred and the first day of the first payroll period of the next succeeding employment term shall be disregarded and not counted.

(h) Objections and restoration. Any employee determined to have violated this subdivision may object to such determination by filing with the chief executive officer, (within twenty days of the date on which notice was served or mailed to him pursuant to paragraph [e] of this subdivision) his sworn affidavit, supported by available documentary proof, containing a short and plain statement of the facts upon which he relies to show that such determination was incorrect. Such affidavit shall be subject to the penalties of perjury. If the chief executive officer shall determine that the affidavit and supporting proof establishes that the employee did not violate this subdivision, he shall sustain the objection. If the chief executive officer shall determine that the affidavit and supporting proof fails to establish that the employee did not violate this subdivision, he shall dismiss the objection and so notify the employee. If the chief executive

officer shall determine that the affidavit and supporting proof raises a question of fact which, if resolved in favor of the employee, would establish that the employee did not violate this subdivision, he shall appoint a hearing officer to determine whether in fact the employee did violate this subdivision after a hearing at which such employee shall bear the burden of proof. If the hearing officer shall determine that the employee failed to establish that he did not violate this subdivision, the chief executive officer shall so notify the employee. If the chief executive officer sustains an objection or the hearing officer determines on a preponderance of the evidence that such employee did not violate this subdivision, the chief executive officer shall forthwith restore to the employee the tenure suspended pursuant to paragraph (f) of this subdivision, and notify the chief fiscal officer who shall thereupon cease all further deductions and refund any deductions previously made pursuant to this subdivision. The determinations provided in this paragraph shall be reviewable pursuant to article seventy-eight of the civil practice law and rules.

3. (a) An employee organization which is determined by the board to have violated the provisions of subdivision one of this section shall, in accordance with the provisions of this section, lose the rights granted pursuant to the provisions of paragraph (b) of subdivision one of section two hundred eight of this chapter.

(b) In the event that it appears that a violation of subdivision one of this section may have occurred, it shall be the duty of the chief executive officer of the public employer involved (i) forthwith to so notify the board and the chief legal officer of the government involved, and (ii) to provide the board and such chief legal officer with such facilities, assistance and data as will enable the board and such chief legal officer to carry out their duties under this section.

(c) In the event that it appears that a violation of subdivision one of this section may have occurred, the chief legal officer of the government involved, or the board on its own motion, shall forthwith institute proceedings before the board to determine whether such employee organization has violated the provisions of subdivision one of this section.

(d) Proceedings against an employee organization under this section shall be commenced by service upon it of a written notice, together with a copy of the charges. A copy of such notice and charges shall also be served, for their information, upon the appropriate government officials who recognize such employee organization and grant to it the rights accompanying such recognition. The employee organization shall have eight days within which to serve its written answer to such charges. The board's hearing shall be held promptly thereafter and at such hearing, the parties shall be permitted to be represented by counsel and to summon witnesses in their behalf. Compliance with the technical rules of evidence shall not be required.

(e) In determining whether an employee organization has violated subdivision one of this section, the board shall consider (i) whether the employee organization called the strike or tried to prevent it, and (ii) whether the employee organization made or was making good faith efforts to terminate the strike.

(f) If the board determines that an employee organization has violated the provisions of subdivision one of this section, the board shall order forfeiture of the rights granted pursuant to the provisions of paragraph (b) of subdivision one of section two hundred eight of this chapter, for such specified period of time as the board shall determine, or, in the discretion of the board, for an indefinite period of time subject to restoration upon applica-

tion, with notice to all interested parties, supported by proof of good faith compliance with the requirements of subdivision one of this section since the date of such violation, such proof to include, for example, the successful negotiation, without a violation of subdivision one of this section, of a contract covering the employees in the unit affected by such violation; provided, however, that where a fine imposed on an employee organization pursuant to subdivision two of section seven hundred fifty-one of the judiciary law remains wholly or partly unpaid, after the exhaustion of the cash and securities of the employee organization, the board shall direct that, notwithstanding such forfeiture, such membership dues deduction shall be continued to the extent necessary to pay such fine and such public employer shall transmit such moneys to the court. In fixing the duration of the forfeiture, the board shall consider all the relevant facts and circumstances, including but not limited to: (i) the extent of any wilful defiance of subdivision one of this section (ii) the impact of the strike on the public health, safety, and welfare of the community and (iii) the financial resources of the employee organization; and the board may consider (i) the refusal of the employee organization or the appropriate public employer or the representative thereof, to submit to the mediation and fact-finding procedures provided in section two hundred nine and (ii) whether, if so alleged by the employee organization, the appropriate public employer or its representatives engaged in such acts of extreme provocation as to detract from the responsibility of the employee organization for the strike. In determining the financial resources of the employee organization, the board shall consider both the income and the assets of such employee organization. In the event membership dues are collected by the public employer as provided in paragraph (b) of subdivision one of section two hundred eight of this chapter, the books and records of

such public employer shall be prima facie evidence of the amount so collected.

(g) An employee organization whose rights granted pursuant to the provisions of paragraph (b) of subdivision one of section two hundred eight of this article have been ordered forfeited pursuant to this section may be granted such rights after the termination of such forfeiture only after complying with the provisions of clause (b) of subdivision three of section two hundred seven of this article.

(h) No compensation shall be paid by a public employer to a public employee with respect to any day or part thereof when such employee is engaged in a strike against such employer. The chief fiscal officer of the government involved shall withhold such compensation upon receipt of the notice provided by paragraph (e) of subdivision two of section two hundred ten; notwithstanding the failure to have received such notice, no public employee or officer having knowledge that such employee has so engaged in such a strike shall deliver or caused[1] to be delivered to such employee any cash, check or payment which, in whole or in part, represents such compensation.

4. Within sixty days of the termination of a strike, the chief executive officer of the government involved shall prepare and make public a report in writing, which shall contain the following information: (a) the circumstances surrounding the commencement of the strike, (b) the efforts used to terminate the strike, (c) the names of those public employees whom the public officer or body had reason to believe were responsible for causing, instigating or encouraging the strike and (d) related to the varying degrees of individual responsibility, the sanctions imposed or proceedings pending against each such individual public employee.

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[1]So in original.

Supreme Court, U. S.
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No. 74-1606

In the Supreme Court of the United States

October Term, 1974

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; BOARD OF EDUCATION OF HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; ROGER WEIHING, ROBERT HAUK, JEAN MEADS, FLOYD MEYER, MERLIN PLAMANN, VICTOR SCHROTH and RONALD SURPRISE, individually and as officers and members of the Board of Education of Hortonville Joint School District No. 1; and **MARVIN OBRY, ROBERT KOHLS and GENE RIEDL,** individually and as administrators of Hortonville Joint School District No. 1,

Petitioners,

vs.

HORTONVILLE EDUCATION ASSOCIATION and MICHAEL WISNOSKI, ROSE MARIE OLSON, THOMAS NADEAU, JUDY MURPHY, RUSSEL LICHTE and RONALD HAMMOND,

Respondents.

BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION AS AMICUS CURIAE

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In the
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OCTOBER TERM, 1974

No. 74-1606

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; BOARD OF EDUCATION OF HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; ROGER WEIHING, ROBERT HAUK, JEAN MEADS, FLOYD MEYER, MERLIN PLAMANN, VICTOR SCHROTH and RONALD SURPRISE, individually and as officers and members of the Board of Education of Hortonville Joint School District No. 1; and MARVIN OBRY, ROBERT KOHLS and GENE RIEDL, individually and as administrators of Hortonville Joint School District No. 1,

Petitioners,

VS.

HORTONVILLE EDUCATION ASSOCIATION and MICHAEL WISNOSKI, ROSE MARIE OLSON, THOMAS NADEAU, JUDY MURPHY, RUSSEL LICHTE and RONALD HAMMOND,

Respondents.

BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

Amicus curiae, National School Boards Association, is a nonprofit federation of this nation's state public school boards associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. It is organized to promote the general advancement of education, to encourage the most efficient and effective organization and administration of the public schools, and to preserve the unique American tradition of lay control, with education policy decisions rendered by those directly accountable to the public through the elective or appointive process. In its thirty-fifth year, National School Boards Association is the only major educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

The individuals who make up this nation's school boards are predominantly lay elected or appointed community representatives, responsible under state law for the fiscal management, staffing, continuity and educational productivity of the public schools within their jurisdictions. National School Boards Association submits this brief in the belief that the decision of the Supreme Court of Wisconsin, in an attempt to follow the commands of the due process clause of the Federal Constitution, threatens the ability of the nation's school boards to govern effectively the schools entrusted to their care and erodes in significant measure the concept of local lay control of public schools.

The parties have consented in writing to the filing of this brief.

ISSUE PRESENTED FOR REVIEW

Whether the elected members of a public school board, who have the exclusive authority under State law to discharge teachers engaged in an illegal strike, are prohibited by the due process clause of the Federal Constitution from doing so because they are not sufficiently impartial decisionmakers.

STATEMENT OF THE CASE

Amicus curiae relies on the statement of the case set forth in the brief for petitioners.

SUMMARY OF ARGUMENT

The decision of the Supreme Court of Wisconsin in this case rests on a presumption of bias. It presumes bias from a school board's exercise of multiple responsibilities with respect to supervision of its teaching staff. The circumstances to which the Wisconsin Court adverted do not, under the standards heretofore articulated by this Court, render the board a biased decisionmaker in the constitutional sense. Nor do they justify taking from the board its important decisionmaking power with respect to staff misconduct.

That the board might have a policy orientation or "institutional bias" against striking is not enough to require the board's disqualification for bias.

The extent to which an adjudicator must be removed and isolated from the issues and parties before him to satisfy due process depends on the nature of the government function involved and a balancing of the interests at stake.

When the government is acting in the role of an employer, both the government and the public have a vital interest in the concerned and effective supervision of employees by those in supervisory roles. In the context of

public school administration, the recruitment and maintenance of an effective and committed teaching staff is among the most important functions school boards serve, and their ability to serve it should be carefully preserved. Bias should not be presumed from the fact of a relationship between the parties. A teacher challenging a school board's ability fairly to adjudicate matters respecting his employment should be required to adduce evidence of actual bias—a manifest inability on the board's part to listen to and evaluate the evidence—before he can disqualify the board from making important decisions affecting the conduct of the schools. The record in the case at bar, far from indicating bias, demonstrates that the Hortonville School Board was capable of acting fairly and did act fairly.

The vitality of local lay control of schools by the community's representatives will not survive if discretion to make lawful decisions and authority to act upon them is stripped from local school boards. The ability of school boards to meet effectively their responsibility to provide a good education for the schoolchildren of their communities depends on their ability to formulate policy, to make judgments on how to deal with the problems that confront them and to take swift and effective action. Their responsibility and concern for the schools, and their awareness of and authority in all aspects of school administration, are their major strength and should not be grounds for disqualification for bias. Because the Hortonville School Board was not shown to be a biased tribunal, it should not have been held disqualified from adjudicating the issues before it.[1]

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[1] Amicus does not address the issue whether, under the facts of this case, liberty or property interests were implicated in the teachers' discharge, but assumes for purposes of argument that the school board was required to afford termination procedures complying with due process.

ARGUMENT

Introduction

This case presents a question of enormous importance to the survival of local lay control of public schools: whether local school boards will be able to maintain their traditional authority and discretion in matters of teacher discipline and discharge.

The Hortonville School Board is typical of school boards across the nation. Like over 90% of the nation's school board members, its members are chosen by popular election.[2] It is the state governmental body charged with responsibility for the proper and effective governance of the public school system on the local level. The employment and maintenance of a qualified teaching staff is one of its most critical functions. To that end, it is required by state law to negotiate the terms of employment contracts with teacher representatives and to enter into contracts with teachers; it has exclusive authority under state law to hire and fire teachers.

The Hortonville teachers, in contravention of state law prohibiting strikes by public employees, went on strike and closed the schools. The school board, following notice and hearing, decided to discharge the striking teachers and hire a new teaching staff. The Supreme Court of Wiscon-

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[2] A study conducted in 1974 found that 93.4% of the nation's school board members are elected to their positions. *See* J. Mecklenberger, *Women on School Boards* 30 (1974). An unpublished National School Boards Association study conducted in January, 1975, and based on a stratified random sample concluded that 94.2% of school board members are elected. *Cf., Wood* v. *Strickland,* 420 U.S. 308, 320 n.11 (1975).

sin held below that despite the state's express and exclusive grant of power to the school board to make teacher discharge decisions, and despite the fact that striking, as a matter of law, constituted cause for discharge, the board was constitutionally disabled from deciding to discharge because it was not an impartial decisionmaker. The Court held further that even if all facts necessary to establish cause for discharge were admitted by the teachers, the board could not, consistent with due process, determine whether they should be discharged or not. It based its decision on the board's participation in collective bargaining negotiations which preceded the strike, observing that the school board members were "not uninvolved in the events which precipitated decisions they were required to make." *Hortonville Education Ass'n* v. *Hortonville Joint School District No. 1,* 66 Wis.2d 469, 494, 225 N.W.2d 658, 671 (1975) [hereinafter cited as *Hortonville Education Ass'n*].

In *Board of Regents* v. *Roth,* 408 U.S. 564 (1972) and *Perry* v. *Sindermann,* 408 U.S. 593 (1972), this Court held that when liberty or property interests are implicated in a public school teacher's discharge, termination procedures must comply with due process. The Wisconsin Supreme Court holds that the due process requirement of a fair hearing disqualifies individuals involved in the circumstances leading to the decision to discharge from making that decision; it applies its holding to a case in which the decisionmakers' "involvement" was simply their participation in collective bargaining negotiations, required of them as school board members by state law. Where *Roth* and *Sindermann* require the government employer to give the employee notice and an opportunity to be heard, the Wisconsin Supreme Court's decision removes the employer's authority to listen and decide. Due process does not require this result.

The Wisconsin Court in the instant case adverted to no factual circumstances which would support a finding of bias under standards heretofore articulated by this Court. Rather, it assumed the school board's bias against the entire teaching staff because of bargaining table conflicts between the board and teacher representatives. It pointed to no evidence of animosity between the board and teachers, no pecuniary interest in discharge on the part of the board members and no directly or necessarily inconsistent functions entrusted to the board.

In presuming bias, the Wisconsin Court pointed to the school board's involvement in related functions it has traditionally exercised in its conduct as an employer of teachers. The Court's decision, if upheld, will significantly alter the nature of government employment since employer "involvement" in the events preceding a decision to discharge occurs, in varying forms and degrees, in virtually every discharge for cause situation. *See Arnett* v. *Kennedy,* 416 U.S. 134, 170 n.5 (1974) (concurring opinion of Mr. Justice Powell).

Public school boards, with the enormous responsibility entrusted to them for the operation and direction of their local schools, must retain the power to make judgments respecting staff misconduct; of all their functions, this one perhaps most significantly affects the quality of a school system. While this case does not present an issue of federal court intervention in state educational affairs, it presents what is more troubling: a state court finding that, absent any evidence of actual bias on a school board's part, the power to discharge, expressly vested in the elected school board by state law, must be taken from it to conform to the federal due process guarantee. Such a significant measure of democratic self-government should not be sacrificed without evidence that it is necessary to do so.

I.

THE HORTONVILLE SCHOOL BOARD HAS NOT BEEN SHOWN TO BE A PRESUMPTIVELY BIASED TRIBUNAL AND THE WISCONSIN SUPREME COURT ERRED IN HOLDING THAT THE BOARD IS CONSTITUTIONALLY DISQUALIFIED FROM ADJUDICATING ISSUES OF STAFF MISCONDUCT.

A. There Was No Probability Of Bias In The Hortonville School Board's Dual Role As Collective Bargaining Agent And Adjudicator Of The Issues Before It.

The decision of the Supreme Court of Wisconsin in this case rests on a presumption of bias from a school board's exercise of its traditional functions in the area of staff supervision. There was no evidence of record indicating that bias actually existed. Amicus respectfully submits that under the standards previously articulated by this Court, the circumstances to which the Wisconsin Court adverted do not present such a probability of actual bias to justify rending from the school board its authority to make an important decision affecting the conduct of its local schools. See *Withrow* v. *Larkin*, 421 U.S. 35, 47 (1975).

The Hortonville School Board, like most school boards across the nation, is vested by state law with substantial responsibility for the conduct of the local schools. Its responsibilities extend to all aspects of staffing including teacher recruitment, hiring, contract negotiations (it is required by Wisconsin law to bargain collectively with teacher representatives) and staff discipline.[3] It has ex-

[3] At least thirty-four states require or permit collective bargaining or meet and confer procedures. *See* Education Commission of the States, *A Legislator's Guide to Collective Bargaining in Education* 6-35 (1975).

clusive authority under state law to hire and discharge teachers.[4] Its primary duty, however, is to provide public

[4] Wis. Stat. Sec. 118.22(2) (1973). In forty-five states, the local school boards have power to hire and fire teachers. Ala. Code tit. 52, §§86, 165, 187; Alaska Stat. §§ 14.20.130, 14.20.140, 14.20.170; Ariz. Stat. Ann. §§ 15-443(A), 15-545(A), 15-252, 15-253, 15-262, 15-263 [see *Johnson* v. *Board of Ed.*, 101 Ariz. 268, 419 P. 2d 52 (1966)]; Ark Stat. tit. 80, §§ 1236, 1245, 509; Colo. Rev. Stat. §§ 22-32-109(f), 22-32-110(h); Conn. Gen. Stat. Ann. §10-220; Del. Code Ann. tit. 14, §§ 1049, 1420; Fla. Stat. Ann. tit. 15, §230.23(5); Ga. Code Ann. §§ 32-607, 32-912; Idaho Code §33-513; Ill.Rev.Stat. ch. 122, §§10-20.7, 10-22.4, 24-1; Burns Ind.Stat. Ann. 20-5-2-2(7); Ia. Code Ann. §§279.12, 279.24; Kan. Rev.Stat. Ann. §§72-5401 to 72-5412; La. Rev.Stat. §17.81; Me. Rev. Stat. Ann. tit. 20, §§161(5), 473(4); Mass. Gen. Laws Ann. ch. 71, §§38, 42; Mich. Comp. Laws Ann. §340.569; Minn. Stat. Ann. §123.14; Vern. Mo. Stat. Ann. §§168.102 to 168.120; Mont. Rev. Code §75-5933; Neb. Rev. Stat. §79-441, 79-1249, 79-1254, 79-1254.01, 79-1254.02, 79-1256, 79-1259, 79-1260; Nev. Rev.Stat. §§391.100, 391.120; N.H. Rev.Stat. Ann. ch. 189, §1339; N.J. Stat. Ann. §§18A: 27-1, 18A: 27-4; N.M. Stat. Ann. §77-4-2; N.Y. Educ. Law §§1604(8), 1709, 1804, 1903, 1952 (McKinney); N.C. Gen. Stat. §§115-72, 115-142; N.D. Century Code §15-29-08; Ohio Rev. Code §§3319.07, 3319.08, 3319.16; Okla. Stat. Ann. tit. 70, §§5-117, 6-103; Ore. Rev. Stat. §332.505; Purdon's Pa. Stat. Ann. tit. 24, §§ 5-514, 11-1106; R.I. Gen. Laws §§16-2-18, 16-12-6; S.C. Code §21-230; S.D. Comp. Laws §§13-8-39, 13-43-15; Tenn. Code Ann. §49-214; Vern. Tex. Educ. Code Ann. §§22.08, 22.09; Utah Code Ann. §§53-4-14, 53-51-4; Vt. Stat. Ann. tit. 16, §§1751, 7152; Va. Code §22-203; Wash. Rev. Code Ann. §28A.58.100; W. Va. Code §§18A-2-1, 18A-2-8; Wis. Stat. §§118.21, 118.22; Wyo. Stat. §21.1-27. Although each local school board in Kentucky and Maryland is empowered to dismiss teachers, its hiring power is subject to the superintendent's approval. Ky. Rev. Stat. §160.290, 160.380; Md. Code Ann. art. 77 §§61, 62, 114. In Mississippi, the school superintendent has discharge power on the local level. Miss. Code Ann. §§37-9-17, 37-9-59. In Hawaii, hiring and firing is done by the state board of education. Hawaii Rev. Laws §296-15. California permits teachers to appeal preliminary board termination decisions to a review body. West Cal. Educ. Code Ann. §§ 12902, 13055, 13252, 13403, 13413.

school education for the community's schoolchildren; to fulfill that duty, it must keep the schools open for 180 days a year to qualify for essential state financial aid.[5]

[5] Wis. Stat. Sec. 121.17 (1973). A minimum number of school days is prescribed by statute or administrative regulation in forty-nine states. Ala. Code tit. 52, §209; Alaska Stat. §14.03.030; Ariz. Rev. Stat. Ann. §15-442(A)(1); Ark. Stats. §80-1503; West Cal. Educ. Code Ann. §17551; Colo. Rev. Stat. §22-50-103; Conn. Gen. Stat. Ann. §10-15; Del. Code Ann. tit. 14, §1023; Fla. Stat. Ann. tit. 15, §236.02(2); Ga. Code Ann. §32-605; Idaho Code §33-512 (1); Ill.Rev.Stat. ch. 122, §10-19; Burns Ind. Stat. Ann. §20-10-2-1; Ia. Code Ann. §279.10; Kan. Rev.Stat. Ann. §70-7032; Ky. Rev. Stat. §157.530; La.Rev.Stat. §17:222; Me. Rev. Stat. Ann. tit. 20, §855; Md. Code Ann. art. 77, §73; Mass. Bd. of Educ. Regs. for School Year and School Day (effective September 1, 1975); Mich. Comp. Laws Ann. §340.575; Minn. Stat. Ann. §124.19; Miss. Code Ann. §37-13-63; Vern. Mo. Stat. Ann. §171.031; Mont. Rev. Code §75-7402; Neb.Rev.Stat. §79-201; Nev.Rev.Stat. §388.090; N.H. Rev.Stat. Ann. ch. 189, §1; N.J.Stat. Ann. tit. 18A, §58-16; N.Y.Educ. Law §3204(4) (McKinney); N.C.Gen. Stat. §115-36(c); N.D.Century Code §15-47-33; N.M.Stat. Ann. §§77-6-1, 77-6-9(A); Ohio Rev. Code §3313.48; Okla.Stat.Ann. tit. 70, §1-109; Ore. Dept. of Educ. Admin. Rule §22-050; Purdon's Pa.Stat. Ann. tit. 24, §15-1501; R.I.Gen. Laws §16-2-2; Defined Min. Program for S.C. School Districts: State Bd. of Educ. Governing Rules at 12, 21, 43 (1974); S.D.Comp. Laws §13-26-2; Tenn. Code Ann. §49-1709; Vern. Tex. Educ. Code Ann. §16.862; Utah Code Ann. §53-2-29; Vt. Stat.Ann. tit. 16, §1071(a); Va. Code §22-5; Wash. Rev.Code Ann. §28A.58.180; W.Va. Code §18-5-15; Wyo. Stat. §21.1-57.

Statutes in many states provide specific penalties, such as loss of state aid, for noncompliance with the minimum day requirements. See, *e.g.*, Alaska Stat. §14.07.070. West Cal. Educ. Code Ann. §17551; Fla. Sta. Ann. tit. 15, §236.02(2); Ga. Code Ann. §32-604; Kan.Rev.Stat. Ann. §70-7032; Mass. Gen. Laws Ann. ch. 71, §4A; Minn. Stat. Ann. §124.19; Mont. Rev. Code §75-7402; Ohio Rev. Code §3317.01; Utah Code Ann. §53-2-30; Vt. Stat. Ann. tit. 16, §1076; W.Va. Code §§18-9B-8, 18-9B-19; Wis. Stat. §§121.01, 121.17(1)(a).

When the Hortonville teachers' strike closed the schools, the school board's responsibility was to find a way to open them again.[6] In the belief, later confirmed by the Supreme Court of Wisconsin, that the strike constituted cause for discharge, the board scheduled and noticed hearings to determine which teachers were striking and whether the striking teachers should be discharged. At the hearing, the teachers conceded that they had engaged in a "work stoppage" and stated through counsel that they had acted uniformly. They refused to respond to the strike charges individually, maintaining that the board could not constitutionally adjudicate the issues before it "because of [its] involvement as to management of this School District and its involvement in the labor dispute which is the basis for the board's consideration . . . ." (A. 86-87, 91.)[7] The board decided to discharge the teachers and commence recruitment of new teachers. The teachers were so notified and invited to reapply for positions. The schools reopened one week after the first day of hearings and 22 days after the beginning of the strike. *See Hortonville Education Ass'n, supra,* 66 Wis.2d at 474-477, 225 N.W.2d at 661-662, 664-665.

[6] The Wisconsin Supreme Court described the school board's predicament thus: "When the teachers went on strike, the school board was undoubtedly faced with a situation that needed immediate attention. Clearly, it had a duty to keep the schools open and staff them with competent teachers. If the schools were closed so that the statutory minimum number of school days was not reached, monetary state school aid would have been denied or jeopardized leading to a severe budget crisis. True, it could have sought an injunction or gone to the WERC for some relief, but neither the courts nor the WERC could hire or fire teachers. Sec. 118.22(2), Stats., provides in part: 'No teacher may be employed or dismissed except by a majority vote of the full membership of the board.'" 66 Wis. 2d at 496-497, 225 N.W.2d at 672.

[7] "A." refers to the page of petitioners' appendix.

The Wisconsin Supreme Court held that while "[a]s much control as possible should be left with the school board to set policy and manage the school," 66 Wis.2d at 498, 225 N.W.2d at 673, the school board's involvement in the contract negotiations created a potential for bias that disqualified the board from deciding what to do about the teachers' strike. The Court said:

> "The background giving rise to the ultimate facts in this case reveals a situation not at all conducive to detachment and impartiality on the part of the school board. The board was the collective bargaining agent for the school district and thus was engaged in the collective bargaining process with the teachers' representative, the HEA. It is not difficult to imagine the frustration on the part of the board members when negotiations broke down, agreement could not be reached and the employees resorted to concerted activity. This is not to suggest, of course, that the board members were anything but dedicated public servants, trying to provide the district with quality education while still keeping within its limited budget. They were, however, not uninvolved in the events which precipitated decisions they were required to make. The decision to discharge was possibly a convenient alternative which would eliminate their labor problems in one fell swoop." 66 Wis.2d at 493-494, 225 N.W.2d at 671.

In *Withrow* v. *Larkin,* 421 U.S. 35 (1975), this Court identified, as situations "in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable," circumstances in which "the adjudicator has a pecuniary interest in the outcome" and those in which "he has been the target of personal abuse or criticism from the party before him." 421 U.S. at 47.

In addition to self-interest and personal animosity, this Court has held that serious and direct inconsistency in the functions an official performs may compromise his neutrality when acting in an adjudicatory role. The Court so held in *Ward* v. *Village of Monroeville,* 409 U.S. 57 (1972), where the town mayor, who was the chief executive official responsible for all aspects of the town's well-being, sat as adjudicator of guilt and assessor of fines in the Mayor's Court, the revenue from which was critically important to the town's financial welfare. The mayor was thus in a direct conflict of interest position between his municipality's interest in guilty findings at the Mayor's Court and his judicial responsibility to "hold the balance nice, clear and true between the State and the accused . . . ." 409 U.S. at 60.

The Wisconsin Supreme Court did not describe the nature of the bias it believed might exist. There was no allegation of pecuniary self-interest on the part of the board members, *see Tumey* v. *Ohio,* 273 U.S. 510, 531-532 (1927), nor was there any evidence that discharging the teachers was necessary to the school district's financial well-being. *See Ward* v. *Village of Monroeville,* 409 U.S. 57, 58-60 (1972). There is no indication of personal animosity between the school board members and any teacher, nor is there proof of harsh, sustained criticism of board members by any teacher such as would presumptively call into question the board's ability to make a fair decision on the merits of that teacher's case. See, *e.g., Taylor* v. *Hayes,* 418 U.S. 488, 501, 503 (1974).[8] See also *Withrow* v. *Larkin,*

[8] There is neither allegation nor evidence that any or all of the teachers participated in collective bargaining sessions or communicated personally with board members on the subject of the contract

(footnote continued)

421 U.S. 35, 53 n. 19 (1975), explaining and limiting *dicta* in *Pickering* v. *Board of Education,* 391 U.S. 563, 578 n. 2 (1968) (appendix to opinion of the Court). The Wisconsin Court adverted to no evidence that the board had received *ex parte* information or made a pre-hearing judgment of any teacher's guilt. See *In Re Murchison,* 349 U.S. 133, 137-139 (1955). *Cf., Withrow* v. *Larkin,* 421 U.S. at 58 n. 25, explaining *Morrissey* v. *Brewer,* 408 U.S. 471, 485-486 (1972).[9]

This Court has adamantly refused to rend apart the structure of multifunctioning administrative agencies, especially on the local level, without a showing that they encompass " 'practically and seriously inconsistent positions . . . .' " *Ward* v. *Village of Monroeville, supra,* 409 U.S. at 60. The Court in *Ward* cited with approval its holding in *Dugan* v. *Ohio,* 277 U.S. 61 (1928), refusing to presume bias in a slightly different factual situation. In

(footnote continued)

dispute. There is thus no reason to believe that personal hostility, such as concerned the Court in *Taylor* v. *Hayes, supra,* was present. In this connection, *Duke* v. *North Texas State University,* 469 F.2d 829, 840 (5th Cir. 1972), *cert. denied,* 412 U.S. 932 (1973), is instructive. In *Duke,* the court refused to presume bias in a university hearing body's decision to discharge a teacher who had been highly critical of the university administration. "The offending statements of Mrs. Duke," the court noted, "were directed against the University administration in general, not against particular members thereof."

[9] The fact that a school board had, in an *ex parte* proceeding, examined "virtually all of the relevant evidence," weighed the evidence and reached a conclusion upon it, was held to disqualify it from adjudicating at a required adversary hearing in *King* v. *Caesar Rodney School District,* 380 F. Supp. 1112, 1119 (D. Del. 1974), *distinguished in Withrow* v. *Larkin,* 421 U.S. 35, 50-51 n. 16 (1975). No such circumstances are present in the case at bar.

Dugan, the town mayor was judge of the Mayor's Court and as in Ward, assessed fines on guilty findings; however, since the mayor was not solely and directly responsible for the town's financial prosperity, the Court held that it was not probable that his non-judicial duties would interfere with his ability to judge. 409 U.S. at 60-61. There was no direct conflict between his judicial and non-judicial responsibilities.

In *Withrow* v. *Larkin,* 421 U.S. 35 (1975), the Court reversed a district court judgment granting an injunction against the enforcement of a state administrative agency's order on bias grounds. The agency challenged was a physicans' examining board, exercising both investigative and adjudicative functions. Insisting upon a showing of a real conflict in functions and finding none, the Court held that there is nothing in such a combination of functions that ". . . necessarily creates an unconstitutional risk of bias . . . ." 421 U.S. at 47. Since there was no foundation indicating real prejudice on the board members' part, the Court presumed that the board members would act honestly and conscientiously. 421 U.S. at 55.

The Court of Appeals for the Fifth Circuit has applied similar principles in rejecting a challenge to the impartiality of a university hearing body, finding plaintiff's charges of bias "inconclusive." The court explained its holding thus:

> "We decline to establish a *per se* rule that would disqualify administrative hearing bodies such as the President's Cabinet from hearing internal university matters solely for the reason that the members are employees of the Board and because some of them participated in the initial investigation of the incident and initiation of the cause under consideration . . . . *Alleged prejudice of university hearing bodies must be based on more than mere speculation and tenuous*

inferences." *Duke* v. *North Texas State University,* 469 F. 2d 829, 834 (5th Cir. 1972), *cert. denied,* 412 U.S. 932 (1973) (citations omitted) (emphasis added).

Even if it is assumed that ultimately futile collective bargaining negotiations culminating in a strike will generate antagonism between school board members and the union, or the teachers' representatives, or even the teachers as a group, it is not reasonable to assume that such antagonism would render a school board member incapable of accurately determining whether an individual teacher engaged in an illegal strike. It was this recognition which caused the Court of Appeals for the Sixth Circuit in *Lake Michigan College Fed'n of Teachers* v. *Lake Michigan Community College,* 518 F.2d 1091, 1099 (6th Cir. 1975) to reject a bias claim in circumstances analogous to those involved here:

> "[E]ven if the Board members were hostile toward the Union and the striking faculty, this animosity would hardly manifest itself in the form of an unfair decision against a teacher who did not participate in the strike."

In the case at bar, the school board has been vested with a combination of functions—budgeting, negotiating, adjudicating, hiring and firing—because the legislature has chosen to make the board fully responsible for the conduct of the schools. These functions are not conflicting. There is nothing about involvement in collective bargaining with teacher representatives, or being responsible for fiscal management of schools, that would reasonably tend to influence the average person's judgment on the question of whether a teacher had participated in a strike or whether a striking teacher should be discharged for such illegal activity. Assuming unconstitutional bias from this combination of functions surely, as this Court said in *Richardson* v. *Perales,* 402 U.S. 389, 410 (1971), "assumes too much . . . ."

B. A School Board's Putative Institutional Bias Against Striking Does Not Constitute Disqualifying Bias.

If the concern of the Wisconsin Supreme Court was that the school board was likely to have been opposed to striking in the school context, this kind of institutional orientation should not be deemed grounds for disqualification.[10]

Philosophical orientation toward issues involved in the cases before them has consistently been rejected as a basis for disqualifying judges and administrators. Disqualifying a school board for this kind of "bias" would require disqualifying from criminal cases all judges who are "hard on crime."

This issue has arisen in a case involving the discharge of school administrators. In *Shaw* v. *Board of Trustees,* 396 F. Supp. 872 (D. Md. 1975), terminated administrators charged that the university hearing body which had discharged them was impermissibly biased, pointing to the fact that some of its members had expressed the view that if the administrators had not met their obligation to obey school rules, they should be dismissed. The court rejected their contention, stating that the fact that board members held such a view:

> ". . . does not constitute . . . such a closed mind and prejudgment of the issues as to prevent their action on the charges in accordance with their responsibilities imposed upon them as Board members." 396 F. Supp. at 888.

A school board, like any administrative agency, will often have a policy orientation; this orientation will reflect the philosophy of the voters who elected or the official who appointed its members. The legislature, incon-

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[10] There is no evidence of such an institutional bias in this case.

trovertibly aware that a school board may have a policy orientation, expressly gave the board the powers challenged here. There is nothing in such a philosophical outlook, however, which could reasonably be expected to interfere with the board's ability, and indeed its desire, to judge the case of each teacher on its own merits. *See Lake Michigan College Fed'n. of Teachers* v. *Lake Michigan Community College,* 518 F.2d 1091, 1099 (6th Cir. 1975).

II.

ABSENT CIRCUMSTANCES NECESSITATING A PRESUMPTION OF BIAS, THE SCHOOL BOARD SHOULD NOT BE DISQUALIFIED FROM ADJUDICATING MATTERS OF HIRING, FIRING AND STAFF DISCIPLINE WITHOUT CLEAR EVIDENCE OF ACTUAL BIAS.

The determination of what process is due in any given situation "must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *Cafeteria & Restaurant Workers Local 473* v. *McElroy,* 367 U.S. 886, 895 (1961). As in the consideration of the kind of notice and hearing which must be provided, the determination of how isolated from the issues and parties the decisionmaker must be to be presumptively fair depends on a balancing of interests. *Compare Duncan* v. *Louisiana,* 391 U.S. 145, 149, 151-152 (1968) *with FTC* v. *Cement Institute,* 333 U.S. 683, 701-702 (1948). Amicus respectfully submits that for the preservation of vital, interested school boards with the capacity to govern internal school affairs responsibly, this Court should require clear evidence of actual bias before it divests school boards of their decisionmaking power with respect to matters of staff discipline.

In the context of administrative regulation, the law places independent value on the administrative adjudicator's experience and expertise, his philosophical commitment to the goals of the legislation he is charged with executing and his interest in effective regulation. Distance from and disinterest in the subject he is adjudicating is neither required nor desired. *See FTC* v. *Cement Institute,* 333 U.S. 683, 701-702 (1948). *See generally* 2 K.C. Davis, *Administrative Law Treatise* § 12.01, pp. 134-138 (1958).

In the context of government employment, those in supervisory roles are relied on to ensure the efficient and competent provision of government services. In the context of public school administration, the community depends on school boards to provide its children with an education that will equip them to meet the challenge of a complex society. The recruitment and maintenance of a competent, effective and dedicated teaching staff is critical to the fulfillment of this function and is one of the school board's most important responsibilities. *See, e.g., Cato* v. *Collins,* 394 F.Supp. 629, 640 (E.D. Ark. 1975).

For government employers in general and school board members in particular, interest and involvement in the performance of their employees is critically important. Discharge decisions *should* be made by those familiar with the individual employee and knowledgeable about his work. And absent a situation in which special discharge procedures have been established, it cannot be at odds with an employee's expectation that such a decision will be made by his employer.[11] See *Arnett* v. *Kennedy,* 416 U.S. 134, 155 (1974); *Board of Regents* v. *Roth,* 408 U.S. 564, 577 (1972).

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[11] With exclusive authority to discharge vested in the Hortonville School Board, *see* Wis. Stat. § 118.22(2) (1973), the Hortonville teachers could have had no other expectation.

Lower courts have acted in recognition of the values implicit in maintaining the traditional employer-employee relationship in the public sector except where due process clearly requires its abrogation. Thus, in *Robison* v. *Wichita Falls & North Texas Community Action Corp.*, 507 F.2d 245 (5th Cir. 1975), where an anti-poverty agency employee challenged his discharge on the basis of the alleged bias of the officials who terminated him, the Court of Appeals for the Fifth Circuit rejected a history of antagonism between the parties as a basis for disqualification:

> "Wichita is a small organization and, not unlike other organizations, is subject to personality clashes, disagreements over policy, and factions among the directors and staff. . . . . Corporate officials designated to serve as judges or arbitrators know the parties whose interests are at stake and are bound to form some judgment regarding their character and competence as well as the needs and policies of the organization. Just as a determination of bias does not follow from the fact that a hearing examiner or trial judge may entertain an unfavorable opinion of a party as a result of evidence received in a prior or connected hearing, a determination of bias will not follow from the mere fact that an arbitrator or deciding authority has prior and independent knowledge of the dispute. . . . Absent some showing of *actual* interest or partiality, we must find no denial of due process. If the courts were to find otherwise, no small public agency would be able to settle its own disputes." 507 F.2d at 253 (emphasis by the court).

In *Couper* v. *Madison Board of Police and Fire Comm'rs*, 369 F.Supp. 721 (W.D. Wis. 1974), the court refused a police chief's request for a temporary restraining order against police board hearings on bias grounds. Although

the court's decision was influenced by its unwillingness to enjoin state administrative processes without an "extremely strong" showing of bias, the court reviewed the plaintiff's bias allegations in light of the board's statutory power to remove the chief and in view of their necessary "continuing working relationship." While the court's language is addressed to the question of the propriety of injunctive relief, the concerns it expresses are relevant here:

> "[*Gibson* v. *Berryhill*, 411 U.S. 564 (1973)] leaves me free to apply what I consider to be a proper constitutional standard, namely, that the showing of the existence of bias in the decision-making entity, such as the Board of Police and Fire Commissioners, must be extremely strong before the board is to be enjoined even from conducting hearings on charges which fall within its exclusive jurisdiction. To adopt any less stringent test would be to introduce unnecessary and undesirable impediments to the supervision of a president of a public university by its governing board, to the supervision of a superintendent of a public school system by the board of education, to the supervision of the medical staff of a public hospital by the executive committee of the medical staff or by the board of directors of the hospital, and to the supervision of other public officials by the boards and committees charged by law with the responsibility for such supervision." 369 F.Supp. at 727 (footnotes omitted).

That the existence of an employer-employee relationship influences the nature of the process that is due was recognized in the plurality opinion of this Court in *Arnett* v. *Kennedy*, 416 U.S. 134 (1974). Kennedy, a discharged civil service employee, had contended that his supervisor, who discharged him, was insufficiently impartial to make the discharge decision because of accusations Kennedy had

made against him. Mr. Justice Rehnquist, for the plurality, noted:

> "Employer-employee disputes of this sort can scarcely avoid involving clashes of personalities, and while a charge that an employee has defamed a supervisor [the charge against Kennedy] may generate a maximum of personal involvement on the part of the latter, a statement of more typical charges will necessarily engender some degree of personal involvement on the part of the supervisor." 416 U.S. at 155-156 n. 21 (dictum).

Mr. Justice Powell, concurring with Mr. Justice Blackmun, stated:

> "In the present case, the Government's interest, and hence the public's interest, is the maintenance of employee efficiency and discipline. Such factors are essential if the Government is to perform its responsibilities effectively and economically. To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch." 416 U.S. at 168.

It is not only the value of responsible and effective management but our national commitment to placing on the community's representatives the responsibility for the conduct of the public schools that argues against the Wisconsin Court's abrogation of school boards' authority in matters of staff conduct. This Court in the past has been sensitive to this important national commitment. *See, e.g., Wood* v. *Strickland,* 420 U.S. 308, 326 (1975).

A number of courts have expressly refused to withdraw decisionmaking power from school governing bodies without evidence of actual bias. In *Duke* v. *North Texas State University,* 469 F.2d 829 (5th Cir. 1972), *cert. denied,* 412 U.S. 932 (1973), the Court of Appeals for the Fifth Circuit held that a showing of actual bias was necessary to justify disqualification of a university hearing body, even on a record of strong public criticism of the university administration by the discharged teacher:

> ". . . [W]e decline to establish a rule that would *per se* disqualify the President's Cabinet composed of the President and two Vice Presidents of the University, from conducting a hearing pertaining to the dismissal of one of its employees, a part-time teacher, merely because the teacher involved has made a broadside attack on the administration of the University, though in terms which are to say the least, vulgar and profane. This is especially true when the record fails to disclose actual bias or prejudice against Mrs. Duke on the part of any member of the President's Cabinet, and likewise of any member of the Board of Regents." 469 F.2d at 840.

In *Simard* v. *Board of Education,* 473 F.2d 988 (2d Cir. 1973), a high school teacher, discharged for insubordination and " 'other due and sufficient cause,' " contended that he had been adjudicated guilty by a biased school board, bent on discharging him for his activities in the Groton Educational Association; these activities included his role as chief union negotiator in a series of bitter contract negotiations. Simard's bias allegations focused, as do those in the case at bar, on the school board's involvement in collective bargaining negotiations. The court rejected his claim that the board should be disqualified because its members' impartiality may have been compromised in bargaining table confrontations. The court explained:

> "School boards frequently negotiate with teachers in their capacity as bargaining representatives. The con-

stitutional rule sought here would require that decisions as to teacher competence be surrendered to a body less familiar with relevant considerations and not responsible under state and local law for making these decisions. Moreover, it is unrealistic to require a Connecticut town to provide more than one body to deal with various aspects of school administration. We do not believe that due process, varying as it does with differing factual contexts, requires so much in this case, absent a showing of actual, rather than potential, bias." 473 F.2d at 993 (footnotes omitted).[12]

In *Kaprelian* v. *Texas Woman's University,* 509 F.2d 133 (5th Cir. 1975), the trial court, like the Wisconsin Supreme Court here, responded to charges of bias by ordering the plaintiff teacher and the school administration to take their discharge dispute to a wholly uninvolved tribunal. The Court of Appeals reversed, stating:

"Having made no finding, as scarcely it could, that the university hearing committee lacked apparent impartiality, the court nevertheless substituted another, to be selected according to procedures of its own devising, and referred all questions to it. Such a measure wants precedent in authority and is at variance with that respect for the academic administrative process and insistence that it be permitted to run its course which are indicated in our . . . opinions. The court's directions apply a *per se* rule of disqualification on suspicion to rend from the structure of authority the very functions which it is created to and must perform if institutional order is to obtain. This was error." 509 F.2d at 138 (footnotes omitted).

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[12] The *Simard* case, involving the discharge of one well-known and uncommonly active union leader on vague and imprecise charges, raises questions of possible personal animosity, discrimination and motive not present in the case at bar.

Amicus respectfully submits that these authorities strike the appropriate balance between the interests of teachers in having a fair opportunity to respond to charges and the interest of the educational institution, and the public, in preserving staff discipline and regulating its own affairs. The authority of local school boards can be preserved and the due process interests of their teaching staffs well protected by requiring clear evidence of actual, debilitating interest or prejudice before a school board is shorn of powers lawfully entrusted to it.

III.

THE PROCEEDINGS BEFORE THE SCHOOL BOARD DEMONSTRATED THAT THE BOARD WAS NOT BIASED.

In holding that the school board's involvement "in the events which precipitated decisions [it was] required to make" constitutionally disqualified it from making those decisions, the Supreme Court of Wisconsin found no evidence of actual bias. The Court expressly noted that it did not find actual unfairness on the part of the board:

"[Our holding] is not to suggest . . . that the board members were anything but dedicated public servants, trying to provide the district with quality education while still keeping within its limited budget." 66 Wis. 2d at 494, 225 N.W. 2d at 671.

The conduct of the board, in manifestly exigent circumstances, demonstrated fairness, deliberateness and a desire to bring the teachers back to school. Two days after the commencement of the strike, the absent teachers were urged by the superintendent of schools to return to work; several teachers returned. A few days later, the superintendent wrote to all teachers still absent, advising them

that the strike was in violation of law and would not be condoned. It was not until twelve days after the beginning of the strike, when the teachers had still not returned to their classrooms, that the school board voted to hold disciplinary hearings. It notified the teachers that they were charged with striking and advised them that the board was considering the termination of teachers found to be on strike.[13] *See Hortonville Education Ass'n, supra,* 66 Wis. 2d at 474-475, 225 N.W. 2d at 661.

The teachers appeared *en masse* with counsel and indicated that they would not answer questions or make statements individually. They sought to introduce evidence of the board's bargaining conduct through cross-examination of school board members; the board deemed this evidence irrelevant, and the teachers made an offer of proof.[14] 66 Wis. 2d at 475, 225 N.W. 2d at 661-662.

The strike continued after the hearing (A. 123), and the board voted to discharge the teachers and begin recruitment of a new teaching staff. The teachers were notified of the board's decision and invited to reapply for positions. The one teacher who did so was rehired. 66 Wis. 2d at 476-477, 225 N.W. 2d at 662.

This record is sparse, but it shows clearly that the Hortonville School Board acted to one end: to reopen the

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[13] The trial court found, and the Supreme Court did not indicate its disagreement, that there is no defense of justification to a charge of illegal striking by public employees in Wisconsin. (A. 123-125, 195-196.)

[14] The teachers alleged lack of timely notice in the trial court, but the court found the notice adequate. (A. 194-196.) The Supreme Court found that the teachers had been given an opportunity to request additional time and had failed to do so. 66 Wis. 2d at 491 n. 7, 225 N.W. 2d at 670 n. 7.

schools. Absolutely no indication of anti-teacher bias appears. The board at no time made any decision or took any action without authority of state law.

This Court has recognized that a decisionmaker's conduct may refute a charge of bias. *See Ungar* v. *Sarafite,* 376 U.S. 575, 585-588 (1964). The conduct of the school board does so here.

CONCLUSION

The courts have never been closed to claims that substantive constitutional rights have been infringed in the context of teacher discharge decisions. *See, e.g., Perry* v. *Sindermann,* 408 U.S. 593, 596-598 (1972); *Connell* v. *Higginbotham,* 403 U.S. 207, 208-209 (1971). Nor has this Court been unable to spot the potential for debilitating personal interest when it exists. *See Gibson* v. *Berryhill,* 411 U.S. 564, 578-579 (1973). But the continued strength of local democratic institutions, and the survival of responsible citizen control of public schools, depends on the willingness of the judiciary, absent evidence to the contrary, to trust state school administrators " 'to be men of conscience and intellectual discipline' " and to rely on them to fulfill conscientiously the responsibilities entrusted to them. *See Withrow* v. *Larkin,* 421 U.S. at 55. It is this trust that has led this Court to find that interested and involved state administrators, following the procedures required by due process, can fairly make decisions affecting significant interests. *See Goss* v. *Lopez,* 419 U.S. 565, 580-582 (1975); *Wolff* v. *McDonnell,* 418 U.S. 539, 564-565, 570-571 (1974).

The Hortonville school board, faced with an illegal strike, had to determine how to fulfill expeditiously its most important responsibility: to provide adequately

functioning schools for the community's schoolchildren. There is nothing in this record to suggest that the board was unwilling to listen to the teachers' response to the strike charges or incapable of making a reasoned judgment on the facts presented to it; indeed, the board had entreated the teachers to return to school. If "a realistic appraisal of psychological tendencies and human weakness"[15] compels a presumption of bias in the circumstances of this case, then there is little hope for the survival of responsible institutions of self-government.

The National School Boards Association therefore respectfully urges this Court to reverse the decision of the Supreme Court of Wisconsin holding the Hortonville School Board constitutionally disqualified by bias from deciding whether or not to discharge its teachers for engaging in an illegal strike.

Respectfully submitted,

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[15] See *Withrow* v. *Larkin*, 421 U.S. 35, 47 (1975).

In The

Supreme Court of the United States

October Term, 1974

No. 74-1606

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; BOARD OF EDUCATION OF HORTONVILLE JOINT SCHOOL DISTRICT NO.1; ROGER WEIHING, ROBERT HAUK, JEAN MEADS, FLOYD MEYER, MERLIN PLAMANN, VICTOR SCHROTH and RONALD SURPRISE, individually and as officers and members of the Board of Education of Hortonville Joint School District No. 1; and MARVIN OBRY, ROBERT KOHLS and GENE RIEDL, individually and as administrators of Hortonville Joint School District No. 1,

Petitioners,

vs.

HORTONVILLE EDUCATION ASSOCIATION and MICHAEL WISNOSKI, ROSE MARIE OLSON, THOMAS NADEAU, JUDY MURPHY, RUSSEL LICHTE and RONALD HAMMOND,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of Wisconsin

BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE

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In The

Supreme Court of the United States

October Term, 1974

No. 74-1606

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Respondents.

On Writ of Certiorari to the Supreme Court of the State of Wisconsin

BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America is the largest association of business and professional organizations in the United States, and is the principal spokesman for the American business community. The Chamber of Commerce has a direct membership of over 52,000 business firms and an underlying membership of approximately 5 million individuals and firms.

The Chamber of Commerce has a direct and legitimate interest in the issues raised in the present case. As citizens in virtually every community in this country, our individual and corporate members are vitally interested in all facets of state and local government, including public sector employment relations. Members of the business community are especially concerned with the advancement of sound personnel practices and employee relations which will insure the continued and uninterrupted operation of governmental functions. A labor dispute affords no reasonable excuse for public employees to disregard the welfare of the general public or inhibit the proper functions of government. Additionally, the business community provides through its tax dollars a substantial portion of the funds which support state and local governments and it shares every citizen's deep concern for the prudent expenditure of those tax dollars.

Because of these vital and legitimate interests of its members, the Chamber of Commerce respectfully submits the

1. This brief is filed with the written consent of all parties pursuant to Supreme Court Rule 42(2).

following brief as amicus curiae. The views expressed by the Chamber of Commerce on behalf of the business community reflect extensive experience with labor relations and collective bargaining in the private sector, and are intended to assist this Court in its resolution of the issues presented in the present case.

SUMMARY OF THE ARGUMENT

In urging reversal of the decision of the Supreme Court of the State of Wisconsin, the Chamber of Commerce has focused on that Court's assumption that the striking school teachers were entitled to a due process hearing broad enough to include deliberations on the nature of the action which was to be taken against them by the School Board. While the Chamber of Commerce recognizes that certain decisions of this Court stand for the proposition that some due process hearings must include deliberations on the kind of state action appropriate in the circumstances, we submit that not every due process hearing must be so broad. There are situations in which due process confers on individuals threatened with the loss of liberty or property only the right to demonstrate that they either did or did not engage in the conduct of which they stand accused; if they did so engage then due process is not offended when the state selects a particular response from a range of possible lawful alternatives, even though the appropriateness of that response is not at issue in the due process hearing. The Chamber of Commerce submits that this is such a case.

Public school teacher strikes are strictly prohibited by Wisconsin state law. Striking is legally sufficient cause for the discharge of a teacher under Wisconsin law, and it is also

sufficient cause for discharge under the employment contracts between the school teachers in this case and their School Board employer. By entering into these employment contracts, the teachers agreed that the School Board would have the exclusive authority to select discharge as a response when sufficient cause for the discharge of a teacher exists. Therefore, the due process hearing required in this case extended to those teachers accused of striking only the right to prove that they did not engage in the strike. Due process did not require that the teachers be accorded the right to a hearing to determine the appropriate action to be taken against those teachers found to have engaged in the strike.

Second, the particular conduct in question in this case, *i.e.*, striking in violation of an express prohibition, is not the kind of conduct which would bring this case within the control of this Court's decision in *Morrissey v. Brewer*, 408 U.S. 471 (1972), the case on which the Wisconsin Supreme Court relies primarily for its assumption that every due process hearing must be broad enough to include deliberations on the kind of state action appropriate in the circumstances. *Morrissey* is a recognition that in some situations in which liberty or property interests are threatened by state action, mitigating circumstances, if known and considered, might warrant governmental action less severe than deprivation. In the teacher strike context, however, mitigating circumstances cannot justify or excuse a strike, and the selection of an appropriate response to the strike cannot be conditioned on the existence of such evidence. In the selection of an appropriate response, other factors must be considered — factors on which the striking teachers would have no proper evidence to present. Thus the broad hearing required in *Morrissey* would serve no essential purpose in the present case.

Accordingly, due process did not give the teachers the right to such a hearing.

Having chosen to focus its attention on the foregoing issues raised in this case, the Chamber of Commerce leaves to the parties the development of the issue of whether the School Board was a sufficiently impartial decision maker for purposes of the limited due process hearing required in this case.

ARGUMENT

I.

SUMMARY OF THE OPINION OF THE SUPREME COURT OF THE STATE OF WISCONSIN.

The Wisconsin Supreme Court decided all issues arising under Wisconsin state law in favor of the School Board. Specifically, the Wisconsin Supreme Court decided that the state ban on public employee strikes is valid and is not a denial of equal protection. *Hortonville Education Association v. Hortonville Joint School District*, 66 Wis.2d 469, 487 (1975). Second, the Wisconsin Supreme Court decided that under Wisconsin law the School Board had the power to discharge teachers who engage in a prohibited strike and that striking is legally sufficient cause for discharging a teacher. *Id.* at 481. Third, the Wisconsin Supreme Court decided that the fact that the School Board had other remedies under state law which it might have pursued does not mean that the teachers were denied equal protection when the School Board chose discharge as the remedy. *Id.* at 482-483.

Having disposed of the questions raised under state law, the Wisconsin Supreme Court turned to the constitutional questions of due process. The Court found that the teachers were discharged while they were still under contract with the School Board. *Id.* at 489. Therefore, the Court concluded that the teachers were deprived of a property right by state action and were entitled to due process of law under the Fourteenth Amendment. *Ibid.* Due process requires adequate notice and an opportunity to be heard, and the Court concluded that both requirements were met in this case. *Id.* at 491. However, the main contention of the Union and the teachers was that they were denied due process of law because the hearings were not considered and their discharges ordered by an impartial decision maker. *Ibid.* The Wisconsin Supreme Court found that the requirement of an impartial decision maker is well established as an essential component of procedural due process. *Id.* at 491-492. The Wisconsin Supreme Court interpreted existing United States Supreme Court authority to mean that procedural due process is not limited to the factual determination as to whether an individual did or did not engage in the particular conduct. It extends as well to the action taken by the state once that conduct is established. The Wisconsin Supreme Court, relying on this Court's decision in *Morrissey v. Brewer*, 408 U.S. 471 (1972) concluded that it is essential, even in cases of undisputed or stipulated facts, that an impartial decision maker be charged with the responsibility of determining what action shall be taken on the basis of those facts. *Hortonville*, 66 Wis. 2d at 493.

Turning to the facts of the case, the Wisconsin Supreme Court observed that the School Board was the collective

bargaining agent for the School District and thus was engaged in the collective bargaining process with the Union. The School Board therefore was not uninvolved in the events which precipitated decisions they were required to make. *Id.* at 493-494. The Court decided that the teachers were entitled to a determination of whether another course of action such as mediation, injunction, continued collective bargaining, or arbitration would have been a more reasonable response on the part of the decision maker. *Id.* at 496. The Court concluded that the School Board was not a sufficiently impartial decision maker in a constitutional sense to make such a determination, and, as a result, the teachers were denied due process of law. *Id.* at 494.

II.

THE DUE PROCESS REQUIRED IN THIS CASE DID NOT GIVE THE STRIKING TEACHERS THE RIGHT TO A HEARING TO DETERMINE THE APPROPRIATE ACTION TO BE TAKEN BY THE SCHOOL BOARD IN RESPONSE TO THE TEACHERS' CONDUCT.

The Wisconsin Supreme Court's decision stands for the proposition that a School Board which engages in collective-bargaining-type negotiations with employees and employee unions cannot also make the final decision to discharge those employees who strike in violation of state law where the strike is connected with or the result of the negotiations. This is true even though the School Board is charged by state law with the exclusive responsibility of hiring and firing its employees. Although the School Board can apparently invoke some other remedy in dealing with employees who strike in violation of state

law, a final decision which would deprive the striking employees of any property interest in their jobs, such as a decision to discharge, must be made by an impartial decision maker which cannot be the School Board. According to the Wisconsin Supreme Court, teachers who strike in violation of a state law absolutely forbidding strikes by public employees are entitled to a due process hearing before someone other than their employer to determine whether another course of action such as mediation, injunction, continued collective bargaining, or arbitration would be a more reasonable response than discharge. The Chamber of Commerce submits that this is an unwarranted extension of the protection granted by the Due Process Clause as it has been interpreted by the decisions of this Court. The teachers' employment contracts and the nature of the teachers' conduct necessarily limited the scope of the due process hearing required in this case.

A. By striking in violation of state law, the teachers gave the School Board legally sufficient cause under state law and under the teachers' employment contracts to discharge the striking teachers without a hearing to determine whether discharge was an appropriate response for the School Board to make.

The constitutional guarantee of procedural due process under the Fourteenth Amendment does not arise until there is present a legitimate "property" or "liberty" interest which is threatened by state action. As this Court stated in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 at 576-578 (1972):

> "The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits . . . . To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it . . . . Property interests, of course, are not created by the Constitution. Rather, they are created *and their dimensions are defined* by existing rules or understandings that stem from an independent source." [Emphasis supplied.]

This Court went on to state that a person may have a protected property interest in public employment if contractual or statutory provisions guarantee continued employment absent "sufficient cause" for discharge. *Id.* at 576-578; *see Arnett v. Kennedy*, 416 U.S. 134 (1974) (Powell, J., concurring in part and concurring in the result in part).

The teachers in this case do have certain interests which are protected by the Fourteenth Amendment. Their protected interests are essentially property interests. These property interests are granted "and their dimensions are defined" both by the teachers' employment contracts with the School Board and by state law. The Wisconsin Supreme Court found that the teachers had been discharged during the terms of their 1973-1974 contracts with the School Board. *Hortonville*, 66 Wis.2d at 489. Each teacher contract incorporated by reference the 1972-1973

master contract between the School Board and the Union.[2] The master contract states in pertinent part as follows:

"MANAGEMENT RIGHTS

> The Board, on its own behalf, and on behalf of the electors of the District, hereby retains and reserves unto itself, without limitations, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by applicable law, rules and regulations to establish the framework of school policies and projects including, but without limitation because of enumeration, the right:
>
> * * *
>
> 2. To employ and re-employ all personnel and, subject to the provisions of law or State Department of Public Instruction regulations, determine their qualifications and scope of employment, *or their dismissal or demotion for just cause*, their promotion and their work assignment . . . [emphasis added]."[3]

In another context, the Wisconsin Supreme Court found that a school board, under state law, has the implied power to dismiss

2. A sample of this employment contract is found at Appendix, page A60.

3. The management rights clause is found in the 1972-1973 master contract between the School Board and the Union at Appendix, page A42-43.

a teacher for "good and sufficient cause." *Hortonville*, 66 Wis. 2d at 480. The implication is that a Wisconsin teacher has a right to continued employment until he gives his employer "good and sufficient cause" for discharge.

It is clear that the teachers' employment contracts and Wisconsin state law extended to the teachers in this case a protected property interest in their employment. Moreover, both the contracts and state law have defined the limits of that interest beyond which the interest cannot extend. The teachers in this case had a legitimate claim of entitlement to continued employment absent sufficient cause for discharge. In these circumstances, the teachers had a property interest safeguarded by due process, and the deprivation of that interest had to be accompanied by some form of notice and a hearing. *See Perry v. Sindermann*, 408 U.S. 593 (1972).

Although the teachers in this case were entitled to due process before they could be deprived finally of their property interests in their employment, there exists no fixed standard of due process which would automatically apply to their situation. As this Court stated in *Morrissey v. Brewer*, 408 U.S. 471 at 481 (1972):

> "Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands . . . .Its flexibility is in its scope once it has been

> determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure."

The teachers' property interests in their employment were extended to them by their contracts with the School Board and by state law. Their entitlement to continued employment was conditioned on the terms of their contracts and on the limitations imposed by state law. Both the contracts and state law authorized discharge for sufficient cause, and the teachers' property interests in their employment were limited to that extent. A teacher who gives his employer sufficient cause for discharge within the meanings of the contract and state law therefore has no entitlement to continued employment and may be discharged at the option of the employer.

The Wisconsin Supreme Court specifically concluded as a matter of law that striking was sufficient cause for discharge under the contracts and under state law. The Court stated:

> "The respondents cite *Millar v. Joint School Dist.* (1957), 2 Wis. 2d 303, 312, 86 N.W. 2d 455, for the proposition that:
>
> 'A school board has implied power to dismiss a teacher before the expiration of his term of service for good and sufficient cause . . . . If a teacher fails to perform his duties under his contract, the board may discharge him from further service.'

* * *

> "Furthermore, the power of the board to discharge a teacher for 'just cause' is clearly preserved in the master contract [footnote omitted] between HEA and the school district.
>
> From the statutes, the cases cited, and the contract, we conclude the school board did have the power to discharge the teachers who engaged in the prohibited strike." *Hortonville*, 66 Wis.2d at 480-481.

By accepting the contracts which gave them their protected property interests, the teachers necessarily also accepted the express limitations on those interests. As discussed *supra*, the teachers agreed that the School Board would retain the right to discharge them for sufficient cause. Those teachers who engaged in the prohibited strike gave the School Board legally sufficient cause to discharge them, and, by agreement, the right to elect discharge as the appropriate response was vested exclusively in the School Board. Since, as a matter of Wisconsin law, engaging in a prohibited strike is sufficient cause for discharge, the teachers had no right to a due process hearing to determine if sufficient cause for discharge existed. Since, by agreement, the School Board retained the right to elect discharge, the teachers had no right to a due process hearing to determine whether discharge was the appropriate response for the School Board to make.[4]

4. The rule ought to be the same in the absence of an express agreement which permits the employer to retain the right to elect discharge. So long as the cause is sufficient and discharge is an appropriate response under state law, then the decision to discharge should be at the election of the employer. That decision should not need to be conditioned on a due process hearing to determine its appropriateness.

The property interests of the teachers were being threatened by state action; therefore, the teachers were entitled to procedural due process. But due process in this case extended to the teachers only the right to adequate notice of the charges against them and the right to a hearing to determine whether those charges were true. The Wisconsin Supreme Court found that the teachers were given adequate notice of the charges against them and they were notified that a disciplinary hearing was to be held at which they would be given the opportunity to present any statement or evidence relevant to the alleged conduct.[5] The hearing took place *before* the decision was made to discharge those teachers who engaged in the strike.[6] The

5. The concurring opinion of Hansen, J., to the decision of the Wisconsin Supreme Court treats the instant case as one for rescission of the contract on the theory that the teachers breached their contracts by striking and refusing to return to work. *Hortonville Education Association v. Hortonville Joint School District*, 66 Wis. 2d 469, 501-504 (1975). The argument has considerable merit, but the case ought to be treated more as involving discharge of the teachers under the terms of the contract since the hearings were styled as disciplinary hearings and discipline or punishment is not generally associated with contract actions. It appears clear that the School Board's intent was to proceed against the teachers under the contract on charges of misconduct.

6. It is submitted that the School Board gave the teachers greater process than was due in the circumstances. A post-termination hearing would apparently have been adequate to protect the teachers' interests in this case. *See* the concurring opinion of Powell, J., in *Arnett v. Kennedy*, 416 U.S. 134 (1974) in which he states:

> "In the present case, the Government's interest, and hence the public's interest, is the maintenance of employee efficiency and discipline. Such factors are essential if the Government is to perform its responsibilities effectively and economically. To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch.
>
> *(Cont'd)*

interests of the teachers in this case were given protection consistent with the limitations inherent in those interests. Therefore, the procedure they were accorded comported fully with the requirements of due process.

B. The right in some cases to a hearing to determine the appropriate state action to be taken in response to improper conduct is designed to give the individual threatened with loss of liberty or property who has, in fact, engaged in the conduct the opportunity to present evidence which might mitigate the seriousness of the conduct or even excuse it altogether; under Wisconsin law, striking by public employees is absolutely prohibited and cannot be excused by mitigating evidence.

In their brief to the Wisconsin Supreme Court, the teachers offered this argument:

(Cont'd)

> Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency. Moreover, a requirement of a prior evidentiary hearing would impose additional administrative costs, create delay, and deter warranted discharges. Thus, the Government's interest in being able to act expeditiously to remove an unsatisfactory employee is substantial. [Footnote omitted.]
>
> Appellee's countervailing interest is the continuation of his public employment pending an evidentiary hearing. Since appellee would be reinstated and awarded back pay if he prevails on the merits of his claim, appellee's actual injury would consist of a temporary interruption of his income during the interim. To be sure, even a temporary interruption of income could constitute a serious loss in many instances. But the possible deprivation is considerably less severe than that involved in *Kelly*, for example, where termination of welfare benefits to the recipient would have occurred in the face of 'brutal need.' [Citation omitted.]"

"The trial court held that there could be no defense to a charge of engaging in a prohibited strike other than to deny that there was a strike. Since there could be no defense to the strike, and since there was no denial of the Board's allegation that the teachers had engaged in a strike, the court concluded that it made no difference who the decision maker was, and, therefore, a lack of impartiality had no bearing on the result. That conclusion depends entirely on the implicit proposition that discharge is an automatic penalty upon proof of a prohibited strike. That underlying proposition is totally erroneous.

As previously noted, the normal and anticipated effect of the strike was for the School Board to seek injunctive relief from the courts. The long tradition in Wisconsin Public Employment Relations supports such a belief. The result of a strike ordinarily is the interjection of an independent intermediary who often is able to persuade the parties to reach an agreement satisfactory to both. Because public employees know that strikes are prohibited and yet compulsory arbitration is not available to most of them, they often invite the court's participation by engaging in strikes. Trial courts, while aware of the legislative prohibition against strikes, do not automatically enjoin them, for they are also aware that public employees are

denied both the right to strike and, except for police and firemen, the right to compulsory and binding arbitration. Thus, courts investigate the situation and listen to both sides and do not automatically interpose an injunctive decree.

Because of the recognition of the lack of bargaining leverage possessed by public employees, other courts are coming more and more to realize that an injunction should not be an automatic response to a public employee strike. [Citations omitted]. This is a recognition by the arm of the government charged with the enforcement of the laws that the remedy to be granted or penalty to be assessed for a violation cannot be automatic but must depend on the circumstances of a case. This position also recognizes that a proper policy goal of the court is to achieve a peaceful settlement of the labor dispute." Appellant's Brief and Appendix in the Supreme Court of the State of Wisconsin, pp. 23-24.

The teachers' argument amounts to this: Although public employees know that strikes are prohibited by Wisconsin state law, they frequently break the law and strike because they think they sometimes have the right to strike and because they have found through experience that the Wisconsin courts also think that public employees sometimes have the right to strike; therefore, on occasion they strike and take their negotiating demands to court; in due course, the court puts pressure on

their employer to settle, and labor peace in the public sector is maintained. To see contempt for the law turned into virtuous argument is indeed disturbing, but more disturbing is the fact that such an argument has found implicit acceptance in the decision of the Wisconsin Supreme Court.

The Wisconsin Supreme Court found that strikes by public school teachers are expressly prohibited by Wisconsin state law, and teachers who engage in such a strike can be discharged by their school board employer. Having thus found, the Wisconsin Supreme Court went on to hold that due process requires the interposition of an impartial decision maker to decide what action is to be taken against striking school teachers because only an impartial decision maker will fairly consider all of the facts and decide what response is reasonable in the circumstances. *Hortonville,* 66 Wis.2d at 493, 494, 496. The Wisconsin Supreme Court's decision that an impartial decision maker must be interposed in such a case so that all facts will be considered and a reasonable response selected is tantamount to saying that some public employee strikes are justifiable under Wisconsin law and a response less severe than discharge should be selected when the facts in evidence appear to justify the strike. If the Wisconsin Supreme Court wishes to tell the Wisconsin Legislature that "no strike" means "no strike except strikes that are justified," then that is strictly a state matter, but the Wisconsin Supreme Court should not be permitted to find its justification in the Due Process Clause where no such justification exists.

For its holding that an impartial decision maker was required in this case, the Wisconsin Supreme Court relied principally on this Court's decision in *Morrissey v. Brewer,*

supra. In particular the Wisconsin Court relied on the following statement found at page 488;

> "This [due process] hearing must be the basis for more than determining probable cause; it must lead to a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation. The parolee must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that violation does not warrant revocation."

From this the Wisconsin Court concluded that even in cases of undisputed or stipulated facts, an impartial decision maker must be charged with the responsibility of determining what action shall be taken on the basis of those facts. This conclusion assumes that every due process hearing must be broad enough to include deliberations on the kind of state action which is appropriate under the circumstances. It is submitted that neither *Morrissey* nor the other decisions of this Court cited by the Wisconsin Supreme Court support such an assumption.

This Court's decision in *Morrissey* acknowledges the fact that in some situations in which protected liberty or property interests are threatened by state action, mitigating circumstances, if known and considered, might warrant governmental action less severe than deprivation. A due process hearing broad enough to include deliberation on the appropriate action to be taken would appear essential in these situations. *Morrissey* is

such a case. The Chief Justice in his sensitive discussion of the function of parole in the correctional process explained very clearly the kind of situation this Court had before it in *Morrissey:*

> "The enforcement leverage that supports the parole conditions derives from the authority to return the parolee to prison to serve out the balance of his sentence if he fails to abide by the rules. In practice, not every violation of parole conditions automatically leads to revocation. Typically, a parolee will be counseled to abide by the conditions of parole, and the parole officer ordinarily does not take steps to have parole revoked unless he thinks that the violations are serious and continuing so as to indicate that the parolee is not adjusting properly and cannot be counted on to avoid anti-social activity. [Footnote omitted]. . . . Implicit in the system's concern with parole violations is the notion that the parolee is entitled to retain his liberty as long as he substantially abides by the conditions of his parole. The first step in a revocation decision thus involves a wholly retrospective factual question: Whether the parolee has in fact acted in violation of one or more conditions of his parole. Only if it is determined that the parolee did violate the conditions does the second question arise: Should the parolee be recommitted to prison or should other steps be taken to protect society and improve chances of

> rehabilitation? . . . The second question involves the application of expertise by the parole authority in making a prediction as to the ability of the individual to live in society without committing anti-social acts. This part of the decision, too, depends on facts, and therefore it is important for the board to know not only that some violation was committed but also to know accurately how many and how serious the violations were." *Id.* at 478-480.

Mr. Justice Douglas in his dissent agreed substantially with this analysis with some elaboration:

> "The status he enjoys as a parolee is as important a right as those we reviewed in *Goldberg v. Kelly.* That status is conditioned upon not engaging in certain activities and perhaps in not leaving a certain area or locality. Violations of conditions of parole may be technical, they may be done unknowingly, they may be fleeting and of no consequence. [Footnote omitted]. . . . The parolee should, in the concept of fairness implicit in due process, have a chance to explain. . . . Words of explanation may be adequate to transform into trivia what looms large in the mind of the parole officer." *Id.* at 495.

Implicit in these analyses is the recognition that some violations of parole are serious and others are not and that society has an interest in differentiating between the two.

Second, it is recognized that mitigating circumstances may properly lessen the significance of the violation or excuse it altogether since it is only necessary that the parolee abide substantially by the conditions of parole. *Id.* at 479. Third, a selection of the proper response, once the nature and extent of the violation are known, must include consideration of both the purpose of the parole procedure in rehabilitating the parolee and the interests of society in being protected from anti-social acts. Selection of the proper response is therefore an exercise of discretion which must take into account (1) society's interest in a flexible parole revocation procedure which preserves its integrity by reserving serious measures for serious offenses, (2) factors which are peculiarly within the knowledge of the parolee, (3) the rehabilitating effect of available responses, and (4) the criminal justice system's fundamental responsibility to protect society. A parolee who has violated the conditions of his parole has a substantial interest in presenting evidence on the first three of these factors,[7] and the tribunal has a duty to condition the exercise of its discretion on the evidence adduced by the parolee. Therefore, the due process hearing required in such a case should be broad enough to include deliberations on the appropriate response to be made once a violation has been established.

The case presently before this Court is fundamently different from *Morrissey,* and the standard of due process

7. The fourth factor should properly be left within the sole discretion of the tribunal. The parolee would not possess evidence bearing on such a determination. Therefore, if this were the only factor to be considered in selecting an appropriate response, the due process hearing itself would not need to be broad enough to include deliberations on the appropriate response.

required is considerably less. The strike ban at issue is found in 1 Wisconsin Statutes, Section 111.70(4)(1) and provides:

> "Strikes prohibited. Nothing contained in this subchapter shall constitute a grant of the right to strike by any county or municipal employee and such strikes are hereby expressly prohibited."

On its face the strike ban is absolute; it does not recognize a distinction between just and unjust strikes. In *Morrissey,* this Court noted that a parolee need only abide substantially by the conditions of his parole, and revocation of parole is an appropriate response to be considered only when the parolee has failed to comply substantially with the conditions of his parole. Thus, every breach of conditions, though technically a violation, is not necessarily a violation of sufficient importance to make revocation of parole an appropriate response. In the present case, however, the strike ban does not allow for substantial compliance; a public employee cannot substantially strike or substantially not strike. Thus, every strike is a violation of state law regardless of the strikers' motivation or the magnitude of the strike, and, as the Wisconsin Supreme Court even recognized, discharge of the strikers is an appropriate response under state law.

The portion of the teachers' brief to the Wisconsin Supreme Court set forth, *supra,* argues that discharge is not an automatic penalty upon proof of a prohibited strike. We agree. Once a prohibited strike has been proven, the selection of a lawful response to the strike requires the exercise of discretion. The discretion at issue here, however, is fundamentally different from

the discretion at issue in *Morrissey*. In the present case, there is no necessity that the exercise of discretion be conditioned on the magnitude of the offense since the strike ban does not recognize degrees of striking. Second, there is no necessity that the exercise of discretion be conditioned on the existence of mitigating evidence since such evidence would normally be offered only in an effort to justify or excuse the strike itself; the strike ban does not recognize just or excusable strikes. Third, there is no necessity that the exercise of discretion be conditioned on the salutary effect available responses might have on the striking employees; a public employer who must deal with a strike is not normally, nor should he be, concerned with rehabilitating the strikers.

The only point at which the exercise of discretion is similar in the two cases is in the duty of the parole tribunal to weigh the effect its response will have on the criminal justice system's fundamental responsibility to protect society and the duty of the public employer to weigh the effect his response will have on the employer's fundamental responsibility to provide a social service. In the case of a school board that fundamental responsibility is the administration of the schools. In the teacher strike context, the only issues on which the striking teachers would have evidence to present (aside, of course, from the issue of whether they, in fact, engaged in the strike) are those issues on which the school board need not condition its exercise of discretion, *i.e.*, the magnitude of the strike, evidence in justification, and the salutary affect on the teachers of available responses. In other words, under state law the discretion vested in the school board to select discharge as a response to a strike is not conditioned on the strikers' reasons for striking but on

the purposes discharge would serve in the larger matter of administration of the schools which is the school board's primary responsibility.

If a hearing were held which was broad enough to include the issue of response to the strike, the hearing tribunal could not properly entertain evidence from the teachers on why they struck since the nature of the strike ban would make it improper for the tribunal to weigh that evidence in making its decision. Moreover, if such a hearing were held, the tribunal would not be obliged to entertain evidence from the teachers on the effect available responses would have on the administration of the schools since that is a management decision peculiarly within the responsibility of the school board. It should also be noted that such evidence would be suspect and of little value due to the bias of the teachers stemming from their immediate interest in the outcome of the board's decision. It appears clear therefore that no legitimate purpose would be served by a hearing of such breadth, and due process ought not to be invoked to require the doing of a purposeless act.

The Wisconsin Supreme Court's reliance on *Morrissey* for its assumption that every due process hearing must be broad enough to include deliberations on the appropriate response to be made is therefore misplaced. Mindful of the flexibility with which due process must be applied in each case, this Court fashioned a procedure in *Morrissey* which met the needs of that case. That procedure, however, does not transfer mechanically to the present case.

For its holding that an impartial decision maker is required in a due process hearing, the Wisconsin Supreme Court cited

three other cases decided by this Court. These three cases were not cited by the Wisconsin Court to support its assumption that every due process hearing must be broad enough to include deliberations on the appropriate response. In fact, they could not have been cited for that assumption because they clearly do not support it.

In *Gibson v. Berryhill,* 411 U.S. 564 (1973), this Court had before it a situation where optometrists who worked for a corporation were being brought before the State Board of Optometry on charges of unprofessional conduct because of their corporate affiliation. The State Board had the power to revoke licenses. The members of the State Board were all independent practitioners and were all members of the Optometric Association. None of the corporate optometrists were members of the Association. This Court held that the State Board was not a sufficiently impartial decision maker for purposes of due process since revocation of the corporate optometrists' licenses and the attendant increase in available patients might redound to the pecuniary benefit of the Board members. Due process was not otherwise offended by the nature of the proceedings, and the Court specifically stated that revocation of the licenses would be justified if the unprofessional conduct were proved. *Id.* at 578.

In *Ward v. Village of Monroeville,* 409 U.S. 57 (1972), the issue before this Court was whether a mayor/judge who had a pecuniary interest in the fines collected in cases brought before him was sufficiently impartial for due process purposes. The Court concluded that he was not because the incentive to convict might cause him to forget the burden of proof required to convict. The underlying assumption in the Court's opinion is

that a fine would be appropriate once a violation was established; due process is not designed to protect a convicted defendant from the fine but to protect the defendant from an unjust conviction.

In *Goldberg v. Kelly,* 397 U.S. 254 (1970), this Court held in part that due process requires an adequate hearing before termination of welfare benefits even though there is a later constitutionally fair proceeding. But the Court stated:

> "Accordingly, the pre-termination hearing has one function only: to produce an initial determination of the validity of the welfare department's grounds for discontinuance of payments in order to protect a recipient against an erroneous termination of his benefits." *Id.* at 267.

Clearly, one of the issues in that hearing is not whether termination of benefits is a proper response once grounds for termination have been established.

The Due Process Clause of the Fourteenth Amendment as interpreted by the decisions of this Court did not give the teachers in this case the right to a hearing broad enough to include the appropriate response to be made to the strike. That decision was exclusively within the discretion of the School Board, and the teachers were not entitled to influence that decision in a due process hearing. The due process hearing required in this case extended to the teachers only the right to prove, if they could, that they did not engage in the prohibited strike.

CONCLUSION

For the reasons set forth above, and those in the Petitioners' brief, it is respectfully requested that the judgment of the Supreme Court of the State of Wisconsin be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1606

Hortonville Joint School District No. 1; Board of Education of Hortonville Joint School District No. 1; Roger Weihing, Robert Hauk, Jean Meads, Floyd Meyer, Merlin Plamann, Victor Schroth and Ronald Surprise, individually and as officers and members of the Board of Education of Hortonville Joint School District No. 1; and Marvin Obry, Robert Kohls and Gene Riedl, individually and as administrators of Hortonville Joint School District No. 1,

Petitioners,

v.

Hortonville Education Association and Michael Wisnoski, Rose Marie Olson, Thomas Nadeau, Judy Murphy, Russel Lichte and Ronald Hammond,

Respondents.

BRIEF OF PENNSYLVANIA SCHOOL BOARDS ASSOCIATION AS AMICUS CURIAE

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STATEMENT OF INTEREST

The Pennsylvania School Boards Association is a voluntary Association which has as its membership the 505 local school districts and the members of the school boards of these school districts, which provides the local governance of the public schools of the Commonwealth of Pennsylvania. The Pennsylvania School Boards Association was organized in 1895 as the first such Association in the Nation and has as its function the rendering of assistance to local school districts and the representation of the general public interest in the field of public education.

The Pennsylvania School Boards Association is committed to the principal of local lay control of public education and is gravely concerned that the decision in this case, if affirmed, will significantly undermine the power and authority of locally elected school officials and remove from such officials the power to take appropriate action to discharge public employees when in the judgment of such locally elected officials such action is required by the then prevailing circumstances. The Pennsylvania School Boards Association is further concerned that if locally elected officials are under a

Constitutional disability to discharge school employees engaged in an unlawful strike, such disability may extend to the power to discharge employees for any reason where, under tenure laws such as those existing in the Commonwealth of Pennsylvania, the school district in the discharge of any professional employee is required to serve notice upon the employee and to accompany such notice with specificiations of charges signed by officials of the school board. The Pennsylvania School Boards Association believes that the decision of the Wisconsin Supreme Court has far reaching implications in diluting the power of locally elected officials and should be reversed in the interest of preserving local lay control in public education.

STATEMENT OF POSITION AND JOINDER IN THE BRIEF OF WISCONSIN ASSOCIATION OF SCHOOL BOARDS, INC.

The Pennsylvania School Boards Association believes that the issue of the preservation of local lay control of public education is ably stated in the brief of the Wisconsin Association of School Boards, Inc., Amicus Curiae, filed in connection with this case. A restatement in this brief of the arguments and authorities there set forth would be a redundancy which would be of no service to your Honorable Court. Accordingly, the Pennsylvania School Boards Association joins in the brief of the Wisconsin Association of School Boards, Inc., and represents to the Court that the positions stated there are in fact the positions of the Pennsylvania School Boards Association. On the basis of the arguments there stated, the Pennsylvania School Boards Association respectfully urges that the decision of the Wisconsin Supreme Court be reversed.

Respectfully submitted,

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IN THE

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Respondents

CONSENT TO THE FILING OF A BRIEF OF AN AMICUS CURIAE

Pursuant to Rule 42 (2), Rules of the Supreme Court of the United States, the parties to the above captioned case, by their counsel, hereby consent to the filing of a brief amicus curiae by the PENNSYLVANIA SCHOOL BOARDS ASSOCIATION, INC. in support of Petitioners.

November 13, 1975.

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Supreme Court, U. S.
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IN THE

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BRIEF AMICUS CURIAE FOR THE NATIONAL EDUCATION ASSOCIATION

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Respondents.

BRIEF AMICUS CURIAE FOR THE NATIONAL EDUCATION ASSOCIATION

INTEREST OF AMICUS*

The National Education Association (NEA) is the largest teacher organization in the United States, with a member-

* The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk of the Court pursuant to Rule 42(2) of the Rules of this Court.

ship of approximately 1.7 million educators, most of whom are teachers in public educational institutions.

One of NEA's primary purposes is to safeguard the constitutional rights of teachers. To that end, NEA has participated as *amicus curiae* in numerous cases involving the extent to which constitutional due process requires procedural protections for public employees who face discharge. See *e.g., Board of Regents* v. *Roth,* 408 U.S. 564 (1972); *Perry* v. *Sindermann,* 408 U.S. 593 (1972). In this regard, the instant case is of primary importance, since it involves the right to an impartial tribunal, which NEA believes is a *sine qua non* of due process.

INTRODUCTION AND SUMMARY OF ARGUMENT

The briefs of petitioners and of the amici supporting petitioners' position fail to mention important aspects of the record in this case. When the full record is considered, the asserted bias in this case is not confined solely to that which might be presumed from the combination of the functions of negotiator and adjudicator in the same persons. Rather, the particular facts of this case require an answer to the following question: Where a hearing is required by the due process clause of the Fourteenth Amendment, does a tribunal whose members must sit in judgment upon allegations of their own prior misconduct satisfy the constitutional requirement of impartiality?

In Part I of this brief, we set forth the portions of the record which establish that the propriety of the School Board members' own prior conduct was inextricably a part of the decision which had to be made as to the Hortonville teachers' employment fate.

In Part II of this brief, we argue that the impartial tribunal requirement of due process was not satisfied here. This argument proceeds in the following steps: First, public school teachers who are employed pursuant to one-year con-

tracts, and who have already signed employment contracts for the succeeding year, have property interests in their jobs which may not be taken from them without compliance with the dictates of the due process clause of the Fourteenth Amendment. Second, an impartial tribunal is an essential ingredient, a *sine qua non,* of due process and is required for the "penalty" stage as well as the "guilt" stage of any proceeding to which the protections of due process apply. Third, a tribunal which is required to pass judgment upon allegations of its own members' misconduct does not satisfy the impartial tribunal requirement of due process. Fourth, a state may not render itself exempt from the constitutional obligation to provide due process by claiming it has policy interests more important than that obligation.

ARGUMENT

I. THIS CASE POSES THE QUESTION WHETHER A TRIBUNAL WHOSE MEMBERS MUST SIT IN JUDGMENT UPON ALLEGATIONS OF THEIR OWN PRIOR MISCONDUCT SATISFIES THE IMPARTIALITY REQUIREMENT OF DUE PROCESS

The briefs of petitioners, and of the amici supporting petitioners' position, fail to mention important aspects of the record in this case. When those aspects are considered, the issue is not as petitioners seek to present it. Those briefs create the illusion that the question here may be resolved nearly on a level of abstraction: can school board members who have personally participated in collective bargaining negotiations, as adversaries of the teachers' bargaining team, constitute a permissible tribunal, consistent with the impartiality requirement of due process, to determine the measure of discipline to be applied to teachers who unlawfully struck in connection with those negotiations. Difficult as that question might be in the abstract, it is not the question raised by the particular facts of this case.

The asserted bias in this case is not merely that which might be presumed from the combination of the functions of

negotiator and adjudicator in the same persons. At their hearing before the Hortonville School Board (hereinafter referred to as "Board" or "School Board"), the teachers, respondents here, sought to mitigate the discipline that might be imposed upon them—the decisionmaker having discretion to determine the appropriate level of discipline for each teacher—by introducing evidence that, if they engaged in a work stoppage, they were provoked to do so by improper conduct of the School Board members. Under Wisconsin law, such evidence, if persuasive, would have to be weighed in determining the appropriate discipline to be imposed on the teachers (see pp. 16-18, *infra*). Whoever was the decisionmaker thus had to pass judgment upon the propriety of prior actions of the School Board members. Certainly, a constitutionally intolerable risk of bias inheres in allowing the School Board members to make that judgment (see pp. 21-26, *infra*).

We turn to the portions of the record which reveal that such judgment was inextricably a part of the decision which had to be made in this case. In this regard, it is important to note that this case has never gone to trial. The issue now before this Court initially arose for decision upon the motion of the defendants—the Hortonville School District and various of its officers and employees including the individual members of the School Board—for summary judgment. (A. 149-150).[1] Plaintiffs, respondents here, did not file a cross-motion for summary judgment. Therefore, the record here consists only of the pleadings of the parties, and affidavits and exhibits introduced to support or oppose defendants' motion.

In Wisconsin, by statute, public school boards have an obligation to bargain collectively with duly elected teacher representatives. Wis. Stat. §111.70(3)(a)(4) (1973). Here, the School Board members personally conducted the negotiations with the representatives of the Hortonville teachers.

[1] All references to the Appendix in this case shall be cited as "A—."

(A. 95-96). In the hearing to decide the fate of the striking teachers, with the same School Board members presiding, the teachers sought to defend their jobs by introducing evidence that these Board members had acted unfairly, improperly, and, indeed, unlawfully during those negotiations; the teachers even sought to examine the School Board members to establish such misconduct. The pertinent portion of the transcript of that hearing, part of the record herein,[2] reads as follows:

> MR. EHLKE [Counsel for most of the teachers]: My first question is, in effect, because of the Board's involvement as to management of this School District and its involvement in the labor dispute which is the basis for the board's consideration, but hard for a neutral tribunal and some disinterested third party. It seems to me it is no more fair that you should sit in judgment of the employees and the employees should be challenged to have violated your office by conduct in labor matters. What we have to have is a third party and I would like an answer to that.
>
> MR. RUHLE [Counsel for the School Board]: As I advised you on the phone yesterday, the Board is the proper party in the first instance to make decisions of this sort, and it will do so, sir.
>
> * * * * *
>
> MR. EHLKE: Without waiving our total objection to this proceeding, to the lack of timely notice, and opportunity to prepare and to the Board sitting as the judge in this matter, we do have some evidence we would like to put into the record.
>
> * * * * *
>
> MR. RUHLE: Will you give us some kind of inkling as to the nature of the evidence you wish to present?
>
> MR. EHLKE: Yes, it goes to bargaining here, and I have some questions of some of the Board members.

[2] See, A. 38, 62-112, 156.

MR. RUHLE: I will advise the Board as I think I advised you on the telephone yesterday, that the bargaining is immaterial to the allegations in the notices. They are immaterial.

MR. EHLKE: Then I would like to make an Offer of Proof.

MR. RUHLE: All right, you may do so.

MR. EHLKE: Our Offer would be that the proposals for the 1974/1975 as presently on the table; were not significant representation, regressive—in particular the salary schedule structure, and regressive salary schedule; the grievance datelines were regressive; the proposals regarding work-day previously agreed to which the parties and the employer was proposing to have unilateral, which no employee in their right mind could agree to. There was a proposal the Board made to be included in the 1974/1975 collective bargaining agreement that had to do with professional responsibility, but it was a proposal that attempted to govern the interim affairs of the Union, and that's wrong. We would furthermore put into evidence that relative to the calendar for 1973/1974 school year, the Board acted through its agents, Mr. Obry, I believe it was the whole student body, and it is our position that is interference in the bargaining process, it is a coercive device, attempted to bring an outside party to the bargaining table—in this case, the student body. Furthermore, the Board has refused to discuss insurance provisions proposed by the Union; has refused to discuss a fair share. Since this action began, at least in the last two weeks, in response to numerous requests by the Union seeking bargaining and attempting to resolve the parties' differences at the bargaining table, which is where it has to be resolved, the Board has refused these overtures and instead has done what we are at today here.

We further would prove that the Union wasn't notified of the efforts of the overtures to the individual employees which brought them here today. The Union wasn't notified previously when the employees were disciplined by docking of their pay, and this is a denial of the employees' right to be represented; unilateral dealing, which is unlawful.

We further would prove some of the lost teaching time has been occasioned by employees being locked out of their places of employment. In fact, as I understand it, one time chains were put on the door which not only constituted violation of the labor law, but as I understand it, is violation of the safe place statute. There were children in the building when chains were put on the doors, locking them in.

Furthermore, relative to information concerning salary—and that's one of the big items that presently divides the parties—officers of the Union and particularly Mr. Wieniewski and Mr. Counard have been denied information they sought information on, in February. They requested certain information in March, March 31st of this year, and that information was denied to the Union. That information was pertinent to the salary negotiations which are one of the things still on the table.

I think we can prove since this bargaining began, and that was in January, 1973, believe it or not, the makeup of the Board's bargaining committee has changed in considerable respects. People have left and other people have come on; the spokesman has changed; one time Mr. Vergimos, one time Mr. Brakway served as spokesman, Mr. Brown served as spokesman, and all of this has had a tendency to undermine the bargaining process, and made bargaining virtually impossible. If you keep changing personnel and spokesmen, how in the world can you resolve differ-

ences. That's what we will show. That is the information I have been able to learn, that I have been advised of, and I would be prepared, and also prepared to put into the record through witnesses today. There may be more, but I haven't had a chance to investigate the matter that fully, because of time limitations. (A. 91-96).

Counsel for the teachers explained at the hearing the relevance and materiality of this offer of proof to the issues before the School Board:

> MR. EHLKE: If your employees are engaged in work stoppage there is provocation, and if there is provocation, it certainly has something to do with whether or not you're going to discharge them. That's what you are talking about here, when you are talking about breaching a contract and discharging somebody, because of that. There has to be just cause. Maybe you did punch the foreman in the mouth, but if he provoked it and caused it to happen, then that act of punching him in the mouth isn't cause for discharge. If more than your employees are engaged in work stoppage, perhaps some conduct by management people is a prerogative and certainly should be taken into consideration if you are going to discharge somebody. That's why it is material and relevant. (A. 97).

Notwithstanding the Board's repeated statement throughout the proceeding that the hearing concerned not only whether a violation occurred but also the degree of discipline to be imposed (see, e.g., A. 69, 80), the Board determined not to consider the proffered evidence:

> MR. RUHLE: My recommendation to the Board is that it did not consider evidence of the sort enumerated in Mr. Ehlke's Offer of Proof. It is on the one hand immaterial to the alleged conduct; it is on the other hand the right kind of allegation and form of

> adjudication of allegations, and then, of course, the Board doesn't need to defend itself against allegations that are to the extent directed one-sided. So I would recommend that they not permit Mr. Ehlke to proceed to prove what he has just offered to prove.
>
> MR. WEIHING [Chairman of the Board]: Is it [sic] so ordered. (A. 96).

The complaint which initiated this litigation referred specifically to the events detailed above (A. 136), as did both the affidavit submitted by plaintiffs in opposition to defendants' motion for summary judgment (A. 169) and the affidavit of the Chairman of the School Board submitted in support of defendants' motion for summary judgment. The latter stated as follows:

> . . .; that Attorney Ehlke asserted to the Board that the defense which the Hortonville Education Association proposed to demonstrate to the Board, by calling some of the Board members individually and asking questions of them, was that the unlawful collective action engaged in by the teachers since March 18, 1974, had been provoked by the Board of Education; the Board of Education, on the advice of its counsel, refused to hear said evidence, but did permit Attorney Ehlke to make an offer of proof which Attorney Ehlke thereafter did. (A. 156).

The trial court, however, misapprehended the import of this undisputed evidence. That court assumed that the only question before the School Board was whether an illegal strike occurred and *not* also what discipline, if any, to impost on each teacher found to be striking:

> . . . [t]he charge of striking in violation of State Statute was the sole charge before the Board of Education; this is not a situation similar to charges of misconduct or inefficiency where it would be necessary for the decision-maker to judge the credibility of witnesses and

> weigh the evidence. The uncontroverted fact in the situation is that a strike existed and therefore the degree of impartiality which may have been required in other settings was not necessary to adjudicate the single fact involved in this case. In that connection it must be noted further that the plaintiff class has not claimed to have been discharged for any constitutionally impermissible reason. (A. 196-197).

With regard specifically to the teachers' proffer of evidence concerning the Board's misconduct and to the teachers' attempt to examine Board members as witnesses, the trial court ruled that these efforts were not relevant to the hearing since they did not serve to validate the strike:

> Thereafter plaintiffs' counsel made an offer of proof confined solely to the bargaining issues. Clearly, the purpose of adversely examining the board members was not directed to the charge of striking but to facts involving negotiations on a variety of issues in the labor dispute; the purpose was to justify the strike which this Court has deemed legally impossible. The denial of adverse examination of various board members in this context was proper. (A. 197-198).

The Wisconsin Supreme Court expressly rejected the trial Court's assumption as to the limited scope of the hearing. The state supreme court held that the determination of what discipline to impose was as much a part of the hearing as the determination whether a violation occurred. Indeed, the Wisconsin Supreme Court premised its holding[3] that due process had been denied particularly upon the penalty portion of the hearing before the Board: "Therefore, it would seem essential, even in cases of undisputed or stipulated

[3] Though the opinion does not expressly say so, the Wisconsin Supreme Court appears, in effect, to have granted summary judgment for the plaintiffs on the issue of unconstitutional partiality, concluding that on the undisputed facts there was such partiality.

> facts, that an impartial decisionmaker be charged with the responsibility of determining what action shall be taken on the basis of those facts." (A. 252). The School Board here, of course, was found by the court not to possess the requisite impartiality.[4]

The Wisconsin Supreme Court's opinion is less than perfectly clear as to the precise basis for its conclusion that the School Board was not an impartial decisionmaker. At the outset of the opinion, the facts regarding the necessity for the members of the Board to sit in judgment upon their own alleged misconduct are recited:

> Their [the teachers'] counsel also objected on due process grounds, . . . that they were entitled to an impartial decisionmaker to determine the appropriate disciplinary measures, if any. Counsel for the teachers alleged that the work stoppage was provoked by the board's conduct, and sought to examine members of the board to establish that fact. This request was refused, but counsel was permitted to make an offer of proof regarding the unsatisfactory nature of the board's contract offers, its allegedly coercive and unlawful bargaining techniques, and an allegation that teachers were locked out of their places of employment. The board refused to consider the offer of proof and the hearing adjourned at 1:20 p.m. (A. 233).

Later, in the section of the opinion explaining the finding that the Board was not impartial, the following statement is made: "They [the Board members] were, however, not uninvolved in the events which precipitated decisions they were required to make." (A. 253). This statement, by itself, is ambiguous: Did the Wisconsin Supreme Court have reference merely to the general involvement of the

[4] For purposes of this brief, we assume, *arguendo,* that the Wisconsin Supreme Court predicated its decision in this case upon federal constitutional grounds.

Board members in negotiations, or to the fact that the specific nature of this involvement (i.e., their alleged misbehavior) was a factor in the decision that had to be made?

This Court, of course, is not in a position to resolve ambiguities in the Wisconsin Supreme Court decision. On either interpretation, this Court would have to reach a decision based on the complete factual record in the case. Certainly, the plaintiffs-respondents are entitled to have their claim judged by its particular factual components, and that right would survive even if the Wisconsin Supreme Court rendered a decision premised on less than all of the facts in the case.

On the assumption, then, that the issue of unconstitutional partiality will be determined here on the basis of the full factual record before the Court, we turn to the legal arguments.

II. WHERE A HEARING IS REQUIRED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, A TRIBUNAL WHOSE MEMBERS MUST SIT IN JUDGMENT UPON ALLEGATIONS OF THEIR OWN PRIOR MISCONDUCT DOES NOT SATISFY THE CONSTITUTIONAL REQUIREMENT OF IMPARTIALITY

In the view of this amicus, the argument supporting respondents' position rests on four simple, indeed nearly self-evident, propositions:

1. Public school teachers who are employed pursuant to one-year contracts, and who have already signed employment contracts for the succeeding year, have property interests in their jobs which may not be taken from them without compliance with the dictates of the due process clause of the Fourteenth Amendment.

2. An impartial tribunal is an essential ingredient of due process, and is required for the "penalty" stage as well as the "guilt" stage of any hearing to which the protections of due process apply.

3. A tribunal whose members are required to pass judgment upon allegations of their own prior misconduct does not satisfy the impartial tribunal requirement of due process.

4. A state may not render itself exempt from the federal constitutional obligation to provide due process by claiming it has policy interests more important than that obligation.

We discuss each of these propositions, as they apply here, in turn.

1. The Hortonville teachers had a property interest in their jobs and thereby had constitutional protection against termination without due process.

In *Board of Regents* v. *Roth,* 408 U.S. 564, 577 (1972), this Court defined the quality of interest in a governmental benefit which amounts to "property" for purposes of determining the applicability of the Fourteenth Amendment's procedural protections:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be aribtrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

The Court in *Roth* went on to make clear that,

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Id. See also, *Perry* v. *Sindermann,* 408 U.S. 593, 602, n.7 (1972).

Here, the Wisconsin courts found that the contractual rights of the Hortonville teachers amounted to property interests which could not be taken away without due process. As the Wisconsin Supreme Court stated,

> In this case the appellant-teachers were discharged during the terms of their 1973-1974 contracts and their offers or contracts for employment for the 1974-1975 school year were revoked or rescinded. This unquestionably amounted to a deprivation of property within the intendment of the due process clause. (A. 247-248).

Petitioners do not contest this much of the Wisconsin Supreme Court's ruling, but they contend that this Court should rule that "[w]here, as here, the teachers have been notified they are considered to be striking, and do not contest the fact even at a record hearing, they should be considered to have abandoned any property for Federal due process purposes." (Brief for Petitioners, hereinafter "Pet. Br." at 20, 21, 32). The obvious flaw in this contention is that it ignores the fact that under the law of Wisconsin the teachers' contracts remained in effect despite the strike.

This Court has previously held, of course, that teachers "dismissed during the terms of their contracts [citation omitted] have interests in continued employment that are safeguarded by due process." *Board of Regents* v. *Roth, supra,* 408 U.S. at 576-577. As noted above, the question whether contract rights exist is one of state law. Thus, petitioners' argument could prevail only if, as a matter of state law, the contractual rights of the teachers are deemed abandoned at the onset of a strike. Here, the Wisconsin courts found state law to provide the contrary. (A. 187, 248). The ruling by the Wisconsin courts that the contractual relationship survived the initiation of the strike is a binding interpretation of state law. As a matter of federal

law, applying the *Roth* definition, these state law-created contractual rights constitute property interests which cannot lawfully be terminated by the School Board without due process.

It is important to add here that, while state law establishing a contractual right is conclusive that a property interest exists as a matter of federal law, it by no means follows that such a property interest could automatically be defeated by state law providing for the termination of a contractual right. By definition, once a property interest exists, the protections of due process apply to any effort by the state to take that interest away. A state may not create a property interest which is immune from those protections.[5] Thus, it may not create such an interest and then avoid the requirements of the Constitution by providing that the interest may be automatically defeated upon the occurrence of a condition subsequent that is not subject to the hearing requirement. If a state, for example, provides that a public employee could be dismissed only for sufficient cause the state could not avoid its obligation to afford an employee facing dismissal a due process hearing on the theory that by engaging in conduct amounting to sufficient cause the employee had "abandoned" his property interest. Such a result would permit the state to circumvent its constitutional obligation by unilaterally determining—without providing the employee a hearing—that cause for discharge existed. Therefore, had Wisconsin law been that contractual rights are abandoned in the event of a strike—even contractual rights for the next school year—the teachers would still have been entitled by the Constitution to the protections

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[5] In *Arnett* v. *Kennedy,* 416 U.S. 134 (1974), a case involving property interests created by federal statute, six members of this Court expressly adopted this view. 416 U.S. at 166-167 (opinion of Justice Powell, joined by Justice Blackmun); 416 U.S. at 177-186 (opinion of Justice White); 416 U.S. at 209-211 (opinion of Justice Marshall, joined by Justices Douglas and Brennan).

of due process before the property interests established initially by those contractual rights could be taken away.[6]

2. An impartial tribunal is an essential ingredient of due process, and is required for the "penalty" stage as well as the "guilt" stage of the disciplinary hearings to which the Hortonville teachers are entitled.

An impartial decisionmaker is a *sine qua non* of procedural due process. All other procedural guarantees are without substance if the deciding tribunal is not so constituted as to be able to render a fair and unbiased decision. A risk of undue partiality jeopardizes the entire structure of procedural safeguards. *In re Murchison,* 349 U.S. 133, 136 (1955); *Gibson* v. *Berryhill,* 411 U.S. 564, 579 (1973); *Withrow* v. *Larkin,* 421 U.S. 35 (1975). Thus, the Constitution does not permit a citizen to be deprived of liberty or property as the result of a determination by a tribunal which is unduly biased. Yet here, petitioners apparently argue that the Constitution tolerates a biased tribunal for the decision as to the measure of discipline the Hortonville teachers should receive: should they lose their jobs or suffer some lesser penalty. We address this contention at this point and show that the impartial tribunal requirement of due process applies to the "penalty" stage of the hearing. In the next section of the brief, we show that the School Board did not meet the constitutional standard of impartiality.

At the outset, it is clear, and petitioners do not dispute, that as a matter of Wisconsin law, the disciplinary decision encompasses two distinct questions: (1) Did each accused teacher engage in an improper work stoppage? (2) In the case of each teacher found to have been so engaged, what measure of discipline should be imposed? The Board,

[6] The Wisconsin courts also found that the teachers here had a liberty interest which required the protections of due process. Since there is so clearly a property interest, the Court need not pass upon this point and therefore we do not address it.

through its counsel, announced at the hearing that both issues were to be determined, conceding that the penalty of discharge does not automatically flow from a finding of involvement in an improper strike. (A. 69, 80).[7] The Wisconsin Supreme Court expressly confirmed this view in its opinion. (A. 239-240, 251-252). Indeed, that court cited one of its prior decisions which had ruled that evidence of the public *employer's* conduct—there with respect to employees other than the one subject to discipline—was relevant in such a proceeding to the determination as to the appropriate penalty to be imposed. *Durkin* v. *Board of Police & Fire Commissioners for Madison,* 48 Wis. 2d 112, 180 N.W. 2d 1, 6 (Wis. Sup. Ct. 1970).

Petitioners' argument is that since the penalty phase of the proceeding did not involve any factual dispute,[8] an impartial tribunal was not required for that phase. (Pet. Br. at 26-27). This argument is wrong both as to the facts of this case and as to the law.

First, petitioners are simply incorrect when they assert that the decision as to penalty did not involve questions of fact. The accused teachers, after all, sought to mitigate the discipline they would receive by showing that they had acted under the provocation of the Board members' misconduct. The decisionmaker was asked, in effect, to find that there had been wrong done on both sides and that under the circumstances a just resolution for each teacher would require discipline less severe than discharge. A factual evaluation of the charges made against the Board members was thus necessitated. The Board cannot evade this this responsibility simply by a self-serving declaration that

[7] In fact, in the case of at least one teacher found by the Board to have been engaged in the alleged strike here, the Board imposed a less severe penalty than discharge. (A. 117).

[8] For purposes of this analysis, we shall assume, *arguendo,* that there was no factual dispute as to whether each of the accused teachers had engaged in an improper strike.

such an inquiry is not material, for Wisconsin law indicates the contrary. See, *Durkin* v. *Board of Police & Fire Commissioners for Madison, supra,* 180 N.W. 2d at 6.[9]

This factual inquiry, no less than the inquiry underlying the guilt determination, requires an unbiased tribunal. At a minimum, the impartiality requirement of due process prevents the deprivation of property on the basis of factual determinations made by a tribunal unable "to hold the balance nice, clear, and true. . . ." *Tumey* v. *Ohio,* 273 U.S. 510, 532 (1927). The property interests of the teachers given protection by the due process clause are no less at risk in the factual inquiry concerning penalty than in that concerning guilt.

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[9] Even if Wisconsin law did not so provide, constitutional due process may also require that, in a situation where, as here, the law makes the degree of penalty turn on the existence of mitigating circumstances, evidence offered in mitigation be admitted before a citizen may be deprived of liberty or property. See, *Cooke* v. *United States,* 267 U.S. 517, 538 (1925):

> The court proceeded on the theory that the admission that the petitioner had written the letter foreclosed evidence or argument. In cases like this *where the intention with which acts of contempt have been committed must necessarily and properly have an important bearing on the degree of guilt and the penalty which should be imposed, the court cannot exclude evidence in mitigation.* (Emphasis added).

In *Morrissey* v. *Brewer,* 408 U.S. 471, 488 (1973), the Court stated that a parolee has a right to introduce evidence in mitigation at a parole revocation hearing:

> The parolee must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation.

See also, *Gagnon* v. *Scarpelli,* 411 U.S. 778, 790 (1973), where this Court, after ruling that an impartial tribunal is required for both the "guilt" and "penalty" stages of a parole revocation hearing, presumed that a right to counsel at the "penalty" stage would exist when:

> even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present.

Perhaps more fundamental, and regardless of the existence of a factual dispute, the argument made here by petitioners would leave the concept of due process twisted beyond recognition. Surely it proves too much to say that the determination to deprive a citizen of property, or presumably liberty, may be made by a biased tribunal whenever that determination does not turn on a dispute of fact. Would petitioners permit a biased judge to impose sentence on a confessed criminal? Would petitioners persevere in their argument here if it were shown that the School Board members had each accepted a bribe in exchange for a promise to discharge the striking teachers?

This notion that due process does not require an impartial decision-maker for the penalty stage of a proceeding involving the deprivation of liberty or property has previously been rejected by this Court. In *Tumey* v. *Ohio, supra,* 273 U.S. at 533, 535, the Court was careful to indicate that the requirement of an impartial tribunal applies as well to the determination of punishment in a criminal case as to the finding of guilt:

> The mayor represents the village and can not escape his representative capacity. On the other hand, he is given the judicial duty first of determining whether the defendant is guilty at all, and *second having found his guilt to measure his punishment between $100 as a minimum and $1,000 as a maximum for first offenses, and $300 as a minimum and $2,000 as a maximum for second offenses.* With his interest as mayor in the financial condition of the village and his responsibility therefor, might not a defendant with reason say that he feared he could not get a fair trial *or a fair sentence* from one who would have so strong a motive to help his village by conviction and a heavy fine?
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> * * * * *

It is finally argued that the evidence shows clearly that the defendant was guilty and that he was only fined

> $100 which was the minimum amount, and therefore that he can not complain of a lack of due process, either in his conviction or in the amount of the judgment. The plea was not guilty and he was convicted. No matter what the evidence was against him, he had the right to have an impartial judge. He seasonably raised the objection and was entitled to halt the trial because of the disqualification of the judge which existed *both because of his direct pecuniary interest in the outcome and because of his official motive to convict and to graduate the fine to help the financial needs of the village. There were thus presented at the outset both features of the disqualification.* (Emphasis added).

See also, *Ward* v. *Village of Monroeville,* 409 U.S. 57, 62 n.2 (1972).

Similarly, in *Morrissey* v. *Brewer,* 408 U.S. 471 (1972) and *Gagnon* v. *Scarpelli,* 411 U.S. 778 (1973), the Court made clear that an independent decisionmaker is required for both the "guilt" and "penalty" stages of parole revocation hearings.[10]

Even petitioners seem to admit that their argument on this point reaches too far. At pages 25 and 29 of their brief, they apparently concede that the proceeding under examination here would have been "constitutionally defective" had there been a "showing of actual pecuniary interest or personal bias." But if they mean this concession, they would have to agree that the due process requirement of an impartial tribunal applies to both segments of a teacher disciplinary hearing. Ultimately, then, their position seems to rest on the assumption that the Board here qualified as the kind of impartial tribunal required by the due process clause. We discuss that assumption next.

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[10] Cf. *Offutt* v. *United States,* 348 U.S. 11, 15 (1954); *Giacco* v. *Pennsylvania,* 382 U.S. 399 (1966); *Witherspoon* v. *Illinois,* 391 U.S. 510 (1968).

3. The School Board could not constitute an impartial tribunal, as required by due process, to review and evaluate allegations of its members' misconduct.

The relationship between a public employer and its employees is unique in many respects, and that very uniqueness poses unusual problems in applying seemingly well-established principles of constitutional law. See, *e.g., Pickering* v. *Board of Education,* 391 U.S. 563, 568-571 (1968). It is not surprising, therefore, that difficulties are encountered in applying the "impartial tribunal" requirement to an employer sitting in judgment upon employees with property interests in continued employment who have been charged with misconduct. On the one hand, there are certain "employer" concerns inherent in the situation: if the employer is the decisionmaker, it may have parochial interests—independent of abstract justice to the employees—which may influence its resolution of the matter.[11] On the other hand, there is a natural reluctance to declare public employers automatically disqualified in all cases from deciding matters which may be central to the efficient accomplishment of public objectives entrusted to them. This clash of values has begun to receive some attention from the lower courts, with no clear resolution yet emerging.[12]

Petitioners, and the *amici* supporting them, attempt to portray this case as one calling for a definitive resolution of this question. They suggest that the issue here is simply whether a public employer is disqualified by its role as "em-

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[11] For example, the employer may want to show other employees that it "means business" in setting down rules of conduct; it may feel impelled to uphold a supervisor's recommendation of discipline simply to preserve the supervisor's authority even though doubting the wisdom or fairness of the recommendation; or, as the teachers have alleged here, it may have a more nefarious motivation, such as breaking a union or diffusing the strength of an employee effort to secure better terms and conditions of employment.

[12] See *Fuentes* v. *Roher,* 519 F.2d 379, 389-390 (2d Cir. 1975); *Lucas* v. *Wisconsin Electric Power Company,* 466 F.2d 638, 652, n. 30 (7th Cir. 1972).

ployer" from sitting in judgment of misbehaving employees. But that is *not* the issue here. The issue here is not whether the members of the school board *qua* employer representatives were disqualified by their "employer" interests, but rather whether those members *qua* human beings were disqualified by the necessity to pass judgment upon the propriety, indeed legality, of their own prior conduct.

The broader "employer" question need not be reached here, for even if the law were ultimately to develop that in ordinary circumstances employers may sit in judgment of their employees, it is our contention that no person, in any context, may sit fairly in judgment of his own conduct.

Whether a constitutionally intolerable risk of bias is present here may be decided by reference to principles already well-established by this Court. Petitioners argue, relying upon this Court's recent decision in *Withrow* v. *Larkin,* 421 U.S. 35 (1975), that "the bare presence of two functions does not disqualify a decisionmaker" (Pet. Br. 27-29). Whatever force that assertion might have had in *Withrow,* it is misplaced here, since, as shown above at pages 3-12, there is in this case, in addition to a combination of functions, a more particular and more powerful biasing factor: the necessity for the members of the School Board to sit in judgment upon allegations of their own misconduct. When the peculiar facts of this case are considered, it is respondents, not petitioners, who may find comfort in the *Withrow* decision.

Withrow marked no departure from this Court's prior commitment to the requirement of an impartial tribunal:

> Concededly, a "fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison,* 349 U.S. 133, 136 (1955). This applies to administrative agencies which adjudicate as well as to courts. *Gibson* v. *Berryhill,* 411 U.S. 564, 579 (1973). Not only is a biased decisionmaker constitutionally unacceptable but "our system of law has always endeavored to prevent

> even the probability of unfairness." *In re Murchison, supra,* at 136; *cf. Tumey* v. *Ohio,* 273 U.S. 510, 532 (1927). In pursuit of this end, various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable. Among these cases are those in which the adjudicator has a pecuniary interest in the outcome and in which he has been the target of personal abuse or criticism from the party before him.

421 U.S. *supra* at 46-47 (footnotes omitted).

The Court in *Withrow* enunciated a standard by which to determine whether a given situation presents a constitutionally intolerable risk of bias: "under a realistic appraisal of psychological tendencies and human weakness," do the circumstances pose "such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Id.* at 47.

The Court found no such risk posed on the facts of *Withrow.* There, unlike here, the risk of bias was solely attributable to a bare combination of functions. The issue was whether administrative officials were automatically disqualified as decisionmakers because they had conducted an initial investigation and issued a "probable cause" determination triggering the proceeding over which they would preside. The Court noted that there, unlike here,

> No specific foundation has been presented for suspecting that the Board had been prejudiced by its investigation or would be disabled from hearing and deciding on the basis of the evidence to be presented at the contested hearing. The mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the Board members at a later adversary hearing.

Id at 55.

Applying the standard it had announced to the facts of the case, the *Withrow* Court concluded:

> The risk of bias or prejudgment in this sequence of functions has not been considered to be intolerably high or to raise a sufficiently great possibility that the adjudicators would be so psychologically wedded to their complaints that they would consciously or unconsciously avoid the appearance of having erred or changed position. Indeed, just as there is no logical inconsistency between a finding of probable cause and an acquittal in a criminal proceeding, there is no incompatibility between the agency filing a complaint based on probable cause and a subsequent decision, when all the evidence is in, that there has been no violation of the statute. Here, if the Board now proceeded after an adversary hearing to determine the appellee's license to practice should not be temporarily suspended, it would not implicitly be admitting error in its prior finding of probable cause. Its position most probably would merely reflect the benefit of a more complete view of the evidence afforded by an adversary hearing.

Id. at 57-58.

Significantly, the Court qualified this holding as follows:

> That the combination of investigative and adjudicative functions does not, without more, constitute a due process violation, does not, of course, preclude a court from determining from the special facts and circumstances present in the case before it that the risk of unfairness is intolerably high. Findings of that kind made by judges with special insights into local realities are entitled to respect, but injunctions resting on such factors should be accompanied by at least the minimum findings required by Rules 52 (a) and 65 (d).

Id. at 58.

Even more important, the Court was careful to distinguish

a line of prior decisions which in our view are controlling here:

> . . . [T]he District Court rested its decision upon *Gagnon* v. *Scarpelli,* 411 U.S. 778 (1973), and *Morissey* v. *Brewer,* 408 U.S. 471 (1972). These decisions, however, pose a very different question. Each held that when review of an initial decision is mandated, the decisionmaker must be other than the one who made the decision under review. *Gagnon, supra,* at 785-786; *Morrissey, supra,* at 485-486; see also *Goldberg* v. *Kelly,* 397 U.S. 254, 271 (1970). Allowing a decisionmaker to review and evaluate his own prior decisions raises problems that are not present here. Under the controlling statutes, the Board is at no point called upon to review its own prior decisions.

Id. at 58, n. 25.

If an intolerable risk of bias is presented where a decisionmaker is called upon "to review and evaluate his own prior decisions," it follows, *a fortiori,* that an intolerable risk exists where, as here, a decisionmaker is called upon to review and evaluate allegations of his own prior misconduct. The risk was intolerable that the parole officers in *Morrissey* and *Gagnon,* or the social workers in *Goldberg* v. *Kelly,* were "so psychologically wedded" to their initial determinations as to "foreclose [ ] fair and effective consideration at a subsequent adversary hearing." 421 U.S., *infra,* at 58. Compare the risk here, where a fair determination of the discipline to be imposed upon each teacher depends on the ability of each Board member impartially to consider and evaluate the charge that he, the Board member, has acted improperly. If the evidence bore out the teachers' charges, a truly impartial tribunal might well decide that the negotiating conduct of the Board was such as to justify a less severe discipline than discharge. But it defies common sense and experience to expect that the Board members themselves could reach this result. "[A] realistic appraisal of psychological

tendencies and human weakness" must convince that to permit the Board members to make this judgment poses an intolerable "risk of actual bias or prejudgment."

This case comes down to a first principle: "[N]o man shall be judge in his own cause." *Bonham's Case,* 8 Co. 114a, 118a, 77 Eng. Rep. 646, 652 (1610); *In re Murchison,* 349 U.S. 133, 136 (1955);[13] see also, *Arnett* v. *Kennedy,* 416 U.S. 134, 170, n.5, 196-199 (1974) (separate opinions of Justices Powell and White); *Fuentes* v. *Roher,* 519 F.2d 379, 389-390 (2d Cir. 1975). As this Court recently put it, an adjudicator may become "so embroil[ed] . . . in [the] controversy that he cannot 'hold the balance nice, clear and true between the State and the accused. . . .'" *Taylor* v. *Hayes,* 418 U.S. 488, 501 (1974); *Johnson* v. *Mississippi,* 403 U.S. 212, 215-216 (1971); *Mayberry* v. *Pennsylvania,* 400 U.S. 455 (1971).

The School Board members simply did not constitute an impartial tribunal within the requirement of due process.

4. A state may not render itself exempt from the federal constitutional obligation to provide due process by claiming it has policy interests more important than that obligation.

Petitioners devote substantial attention in their brief to arguments which amount to a claim that Wisconsin school boards should be considered exempt from the impartial tribunal requirement of constitutional due process. We are told, in effect, that the State of Wisconsin has chosen to structure its public school system in a manner which in circumstances such as present here is inconsistent with that constitutional requirement, and that, therefore, when such cir-

[13] The Court in *Murchison,* 349 U.S. at 138-139, made the following observation, which has pertinence here: "If the charge should be heard before that judge, the result would be either that the defendant must be deprived of examining or cross-examinating him or else there would be the spectacle of the trial judge presenting testimony upon which he must finally pass in determining the guilt or innocence of the defendant."

cumstances arise, the Constitution must give way. As we shall show, these arguments not only are misguided as a matter of law but also rest upon disingenuous factual premises.

Petitioners' arguments in this regard may be summarized as follows: In Wisconsin, each public school board is comprised of members chosen by an election within the school district it governs. To each board so constituted, state law commits the sole power to hire and fire teachers and, more generally, to run the schools within its district. The decision of the Wisconsin Supreme Court requires that in cases such as this, a body other than a school board may ultimately determine whether a teacher should be discharged. Therefore, the argument runs, the school district's electorate is deprived of its right to have that determination made by its elected representatives. Indeed, petitioners argue, the electorate is deprived of its right to have those representatives make the basic policy determinations as to how the schools should be run. This result, they say, is unacceptable.

The short answer to these contentions is that petitioners have apparently forgotten the supremacy clause of the Constitution. Federal constitutional rights do not give way to inconsistent state policies. The states are free to structure their institutions as they wish, but always within the limits set by the Constitution. Petitioners' argument here is completely circular: Wisconsin has established a procedure which violates due process, and, therefore, the requirements of due process should give way to the state policy underlying that procedure.

This Court rejected a similar argument in *Tumey* v. *Ohio, supra,* 273 U.S. at 534-535, when it held that the institution established by the state to make certain judgments on behalf of the community was constitutionally disqualified from doing so:

> Counsel for the state argue that it has been decided by this Court that the legislature of a state may provide such system of courts as it chooses, that there is nothing

in the 14th Amendment that requires a jury trial for any offender, that it may give such territorial jurisdiction to its courts as it sees fit, and therefore that there is nothing sinister or constitutionally invalid in giving to a village mayor the jurisdiction of a justice of the peace to try misdemeanors committed anywhere in the county, even though the mayor presides over a village of 1,100 people and exercises jurisdiction over offenses committed in a county of 500,000. This is true and is established by the decisions of this court in Missouri v. Lewis (Bowman v. Lewis) 101 U.S. 22, 30, 25 L.ed. 989, 992; Re Claasen, 140 U.S. 200, 35 L.ed. 409, 11 Sup. Ct. Rep. 735. See also Carey v. State, 70 Ohio St. 121, 70 N.E. 955. It is also correctly pointed out that it is completely within the power of the legislature to dispose of the fines collected in criminal cases as it will, and it may therefore divide the fines as it does here, one-half to the state and one-half to the village by whose mayor they are imposed and collected. It is further said with truth that the legislature of a state may and often ought to stimulate prosecutions for crime by offering to those who shall initiate and carry on such prosecutions rewards for thus acting in the interest of the state and the people. The legislature may offer rewards or a percentage of the recovery to informers. United States v. Murphy, 16 Pet. 203, 10 L.ed. 938.

It may authorize the employment of detectives. *But these principles do not at all affect the question whether the state by the operation of the statutes we have considered has not vested the judicial power in one who by reason of his interest, both as an individual and as chief executive of the village, is disqualified to exercise it in the trial of the defendant.* (Emphasis added.)

Even on their own terms, however, petitioners' arguments do not bear analysis. In the first place, they prove too much. As discussed above, petitioners seem to concede in their brief

that if "a showing of actual pecuniary interest or personal bias" were made, the proceeding before the School Board would be "constitutionally defective" (Pet. Br. 29). But in those circumstances, as here, disqualification of the Board would require that another tribunal make the decision. Thus, with this concession, petitioners' arguments reduce again simply to whether the risk of bias here is tolerable. As discussed in the preceding portion of this brief, by the standards established by this Court, the risk of bias here is constitutionally intolerable.

Second, analysis of Wisconsin law reveals that the power of public school boards to discharge teachers is by no means sacrosanct even as a matter of state law. As petitioners note in their brief (Pet. Br. 29-31), and as discussed in the opinion of the Wisconsin Supreme Court (A. 255), state law already provides two methods by which a school board's decision to discharge a teacher may be reviewed: (1) by common-law writ of certiorari to, incidentally, the very court in which the Wisconsin Supreme Court has now vested the power of *de novo* review when a school board is constitutionally disqualified from sitting; (2) by a complaint filed with the Wisconsin Municipal Employment Relations Commission. The Wisconsin Supreme Court found that neither of these two modes of review is adequate in scope to rectify the problem in this case. (A. 255). Nevertheless, their existence reflects that the policy of the State of Wisconsin contemplates bodies other than school boards ruling on the validity of teacher discharges; the state courts and a state commission may overrule a school board decision to discharge a teacher and may indeed require that the teacher be reinstated. (Pet. Br. at 30). It was, perhaps, this structure of review to which the Board's attorney referred in the course of the hearing in this case. when he said: ". . . [T]he Board is the proper party *in the first instance* to make decisions of this sort, ..." (A. 92).

Petitioners' final argument from state policy can only be

characterized as disingenuous. They insist that to disqualify a school board in a case such as this would deprive it of the power to deal effectively with an illegal teacher strike and indeed of the ability to keep the schools open in case of such a strike. (Pet. Br. 15-18). Every effort is made by petitioners to transform this case from one concerning a teacher termination hearing to one concerning "the decision 'what to do' about schools closed by an illegal strike." (Pet. Br. 29, n.8).

The fact is, however, that the Board's ability to keep the schools open is not dependent on the resolution of this case. As petitioners admit, the Board could have obtained injunctive relief against the illegal strike. (Pet. Br. 16). Petitioners feebly offer only that "[p]ublic employees have continued to strike, or begun another strike despite an injunction." (Pet. Br. 16, n.1). Surely the state judiciary is not impotent to enforce its own decrees.

It is pertinent here that Wisconsin courts have not considered teacher strikes necessarily to create the significant risk of public harm which petitioners assert. In Wisconsin, teacher strikes are not considered, *per se,* to create an "immediate and serious harm to public health and safety," and, accordingly, Wisconsin courts do not automatically act to enjoin such strikes. In *Joint School District No. 1, City of Wisconsin Rapids* v. *Wisconsin Rapids Education Association,* ——Wis. 2d. ——, —— N.W. 2d ——, 90 LRRM 3225, 3232 (1975) (Wis. Sup. Ct. Case No. 116, August Term, 1975), the Wisconsin Supreme Court stated the law and the policy of the state as follows:

> Public employment strikes are a reality which cannot be ignored. While the potential for immediate and serious harm to public health and safety is very real in the case of strikes by policemen, firemen, and, to a lesser extent, sanitation workers, it is not critical where, for example, the strike is one by teachers, clerical employees or construction workers and others. We conclude in this case that immediate and serious harm to public health and safety was not apparent and that an injunction should issue only after a showing of irreparable harm dependent upon the facts and circumstances as shown at the hearing.

Thus, as justification for blinking the requirements of due process, petitioners ask this Court to exalt the importance of the harm caused by Wisconsin teacher strikes beyond that accorded by the Wisconsin Supreme Court. In any event, where the Wisconsin courts find it appropriate to put an end to a strike, they have the power to do so. The issue in this case is not the ability of the state to keep its schools open, but whether teachers were deprived of their jobs, in which they had a property interest, without protections required by due process.

In this connection, petitioners also suggest that the relief provided in the instant case by the Wisconsin Supreme Court would effectively preclude the School Board from making meaningful policy determinations as to how to deal with the strikers. But the decision of that court contemplates not only an initial decision by the School Board, but also full opportunity for the Board to participate as an adversary in the *de novo* court hearing. (A. 257). Presumably, the Board would be fully able to present all of its policy determinations—including all those which have been presented to this Court—to the reviewing court, and that court would have to accord due weight to such determinations.

It is important to remember that while the decision that the Board must be disqualified is one based on federal law, the decision as to what substitute procedure to adopt is one of state law—as long as the procedure adopted conforms to the mandates of the federal constitution. The particular choice of remedy adopted by the Wisconsin Supreme Court is not the issue here. The words of this Court in *Morrissey* v. *Brewer, supra,* 408 U.S. at 488-489, have application here:

> We cannot write a code of procedure; that is the re-

> sponsibility of each State. Most states have done so by legislation, others by judicial decision usually on due process grounds. Our task is limited to deciding the minimum requirements of due process. (Footnote omitted.)

See also, *Niemotko* v. *Maryland,* 340 U.S. 268, 285 (1951) (Justice Frankfurter concurring in the result).

If the procedure adopted by the Wisconsin Supreme Court does not fully realize the legitimate state values which are implicated, relief must be sought from the Wisconsin legislature or courts. Certainly, numerous other states have managed to adopt procedures for handling teacher discharge hearings which would have avoided the constitutional defect present here.[14]

For now, however, this Court should affirm the finding of the Wisconsin Supreme Court that the School Board in this case did not constitute an impartial tribunal as required by the due process clause of the Fourteenth Amendment.

[14] See, *e.g.*, Cal. Educ. Code Ann. (Deerings) §§13412-13439; Colo. Rev. Stat. §§22-63-117; Nev. Rev. Stat. §§391.311-391.3194; N.J. Stat. Ann. title 18A, §§6-9, 27, 30.1 and 28-5; N.Y. Educ. Law §3020-a (McKinney); Ore. Rev. Stat. §§342.805 to 342.955; Wash. Rev. Code §§28A.58.450—28A.58.515.

CONCLUSION

For the foregoing reasons, the decision of the Wisconsin Supreme Court should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1606

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; BOARD OF EDUCATION OF HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; ROGER WEIHING, ROBERT HAUK, JEAN MEADS, FLOYD MEYER, MERLIN PLAMANN, VICTOR SCHROTH and RONALD SURPRISE, individually and as officers and members of the Board of Education of Hortonville Joint School District No. 1; and MARVIN OBRY, ROBERT KOHLS and GENE RIEDL, individually and as administrators of Hortonville Joint School District No. 1,

PETITIONERS,

v.

HORTONVILLE EDUCATION ASSOCIATION and MICHAEL WISNOSKI, ROSE MARIE OLSON, THOMAS NADEAU, JUDY MURPHY, RUSSEL LICHTE and RONALD HAMMOND,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

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J.T. No. N15054

In Re: Hortonville Joint Sch. Dist. #1 et al v. Hortonville Education Assn. et al
(U.S. Supreme Court, Oct. Term, 1974, No. 74-1606)

State of Minnesota
County of Hennepin

AFFIDAVIT OF SERVICE

Mark Cullen *of the City of Minneapolis, County of Hennepin, State of Minnesota, being duly sworn, says that on the* 12 *day of* February, 1976, *he served the* Reply Brief of Petitioners *in the above entitled case on the following attorney(s) by enclosing two copies of same in a properly addressed envelope for shipment by:* ☒ *Mail* ☐ *United Parcel* ☐ *Personal Delivery*
Robert H. Friebert, Suite 440, 710 N. Plankinton Ave., Milwaukee, WI 53203

Subscribed and sworn to before me this 12 *day of* February, 1976

(Signed) Mark Cullen

Ruth A. Blass

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Notary Public, Hennepin County, Minn.
My Commission Expires April 15, 1978.

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OCTOBER TERM, 1974

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PETITIONERS,

v.

HORTONVILLE EDUCATION ASSOCIATION and MICHAEL WISNOSKI, ROSE MARIE OLSON, THOMAS NADEAU, JUDY MURPHY, RUSSEL LICHTE and RONALD HAMMOND,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

REPLY BRIEF FOR PETITIONERS

SUMMARY OF ARGUMENT

The Wisconsin Supreme Court, relying on *Morrissey* v. *Brewer*, 408 U.S. 471 (1972), concluded that the petitioner School Board was prohibited from choosing among admittedly lawful responses to a prohibited strike by its employees. The Wisconsin court expressly disclaimed any suggestion that the elected Board members had acted as other than

"dedicated public servants" trying to fulfill a duty to keep the schools open and staffed with competent teachers. Nonetheless, the court below ousted the Board from its traditional and statutory role as employer. A *de novo* proceeding before a state trial judge was created to determine whether there was a "more reasonable" response to the illegal strike.

This case does not involve a pecuniary interest or personal bias. Respondents' reliance on *Taylor* v. *Hayes*, 418 U.S. 488 (1974), to show that the school board members were biased towards discharge is contrary to express findings of the Wisconsin courts. Moreover, there are no allegations of personal animosity akin to that found in *Taylor* v. *Hayes*. That the Board refused to abdicate its statutory responsibilities and sought to accurately determine which teachers were participating in the illegal strike by complying with the procedural dictates of *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), cannot be the basis of inferring a disqualifying bias.

The Wisconsin court erred in concluding that the Due Process clause required a decisionmaker which did not have a policy-making responsibility in the collective bargaining process. The Due Process clause as construed by this Court has not required—and should not require—that public employee decisions ultimately be made by political and policy neuters.

Here neither respondents nor their parent union, the National Education Association, as amicus, argue that the Wisconsin Supreme Court correctly construed the Due Process clause. Rather, both assert that this case merely concerns employee disciplinary proceedings in the abstract, and they assert the Wisconsin court really held the petitioners "penalized" the teachers by discharging them. This assertion obviously overlooks the fact that the termination notices effectively stated that any teacher would be replaced *only* if he or she continued to strike unlawfully.

Having erroneously posited that the striking teachers were penalized, respondents next assert that the School Board's bargaining conduct was a "mitigating" circumstance in selecting the proper "penalty." Thus, respondents argue, the School Board cannot constitutionally decide to discharge them "because a truly impartial tribunal might well decide that the negotiating conduct of the Board was such as to justify a less severe discipline than discharge." (See NEA Br., p. 25)

The teachers' penalty argument, if accepted, would effectively oust school boards from their traditional and statutory role and, in the process, would insulate unlawful strikes from timely response. Wisconsin law already provided procedures—ignored by respondents—for determining if petitioners bargained unlawfully or otherwise violated respondents' rights. Thus, the principal effect of respondents' argument would be to substitute the courts, and ultimately the Federal courts, as the final arbiters of public employee administration.

The Due Process clause does not require that every government action that affects "property" interests be taken only after a complete trial-type proceeding. Here the government's interest was in promptly reopening the schools. The striking teachers obviously support time-consuming procedures because such procedures effectively reduce the options which the Legislature has conferred upon the Board for quickly dealing with the strike. However, Respondents' due process interests are limited to procedures that protect against an erroneous taking of property. Here their "prop-

erty" interest was conditioned on the absence of legal "cause." Participation in the strike, under Wisconsin law, constituted "cause" for termination. The teachers admitted such conduct during a procedurally fair hearing. At that point the Due Process clause was satisfied; the teachers have no constitutional right to continue illegally striking and to retain their employment.

ARGUMENT

I.

RESPONDENTS HAVE FAILED TO SHOW THAT PETITIONERS' ACTION IN THIS CASE WAS TAINTED BY CONSTITUTIONALLY IMPERMISSIBLE BIAS.

As respondents and their amicus, the National Education Association (NEA), implicitly recognize in their briefs, a crucial question in this case is whether the School Board and its members suffered from a constitutionally impermissible bias which taints the proceeding that led to respondents' discharge. The ultimate conclusion that the School Board "was not an impartial decisionmaker in a constitutional sense" (A. 253) must be supported by a finding that petitioners were in some sense biased.

Respondents now argue that petitioners should be found guilty of actual bias, the kind of personal hostility or pecuniary self-interest that infected the proceedings in *Taylor* v. *Hayes*, 418 U.S. 488 (1974), and similar cases. The simple answer to this argument is, of course, that respondents failed to prove such bias and the Wisconsin courts expressly found that it did not exist. As stated by the Wisconsin Supreme Court, "This is not to suggest, of course, that the board members were anything but dedicated public servants, trying to provide the district with quality education while still keeping within its limited budget." (A. 253)

Thus, actual bias is not an issue here. As this Court first said a generation ago and reaffirmed only last Term in *Withrow* v. *Larkin*, 421 U.S. 35, 55 (1975), "Without a showing to the contrary, state administrators, 'are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.' *United States* v. *Morgan*, 313 U.S. 409, 421 (1941)."[1]

Amicus NEA attempts to establish unconstitutional bias by still another theory not adopted by the Wisconsin Supreme Court. Petitioners were biased, NEA contends, because *respondents* sought to make petitioners' misconduct an issue in the discharge and replacement process. By not allowing evidence on this issue, but merely allowing an offer of proof, the School Board allegedly established its own unconstitutional partiality.

There is an inherent danger in this argument which was recognized in *Taylor* v. *Hayes*, namely, that a school board or other agency "can be driven out of a case" by any party sufficiently astute to *allege* the presence of such issues. See 418 U.S. at 503 n. 10, 530. Here, respondents' allegations and offer of proof did not persuade the Wisconsin courts that petitioners suffered from actual bias. The blanket rule proposed by NEA would result in wholesale disqualification of governmental agencies accused of "misconduct" and should be rejected.

---

[1]See also, *Sacher v. United States*, 343 U.S. 1 (1952), and *Ungar v. Sarafite*, 376 U.S. 575 (1964), discussed in *Taylor v. Hayes*, 418 U.S. 506 (1974), which apply a presumption of impartiality to judges involved in direct contempt situations, absent convincing evidence of personal animus.

In addition, it is important to note that the "misconduct" of which the Board was accused involved alleged collective bargaining improprieties over which the Wisconsin Employment Relations Commission, not the Board, has jurisdiction. If petitioners were guilty of the misconduct alleged, the WERC is empowered to remedy the unfair practice, a remedy which respondents failed to invoke. Since the WERC has not acted to the contrary, the School Board must remain free to proceed with the discharge and replacement process. Otherwise, respondents' refusal to file a complaint in the proper forum brings government to a standstill!

Despite the attempt by respondents and the NEA to manufacture an issue of actual bias not found by the Wisconsin courts, it seems clear that this case, like *Withrow* v. *Larkin*, involves solely the issue of whether the School Board's multiple statutory duties create an unconstitutional risk of institutional bias. Even the offer of proof and the request to substitute bargaining for the discharge proceedings, made by respondents at the pretermination hearing, addressed the institutional relationship between the Board and the Union, not any personal contact or conflict between Board members and any teacher. The Wisconsin court clearly based its decision on these institutional relationships. Concluding that *Morrissey* v. *Brewer* requires a "neutral and detached" decisionmaker, the Wisconsin court concluded that the Board failed that test because it was "not uninvolved in the events which precipitated decisions they were required to make."

What the Wisconsin court and respondents failed to appreciate, however, is that the standard applied to parole

revocation proceedings in *Morrissey* was based upon this Court's thorough examination of "the function of parole in the correctional process," 408 U.S. at 477, including analysis of the respective interests of the parolee and the State.

Respondents implicitly recognize that *Morrissey* does not require displacing a decisionmaker because of its policy orientation. Respondents further recognize that, even as to their "mitigation" argument, the application of *Morrissey* depends on personal bias. Thus, at page 46, note 26, of their brief, respondents state their concern that the parole officer in *Morrissey* personally misled or was personally unreasonable to the parolee.[2] Yet respondents argue here that the Board, as a seven-member elected institution bargaining with a union representing teachers, was biased *per se*, merely because the Board had an institutional responsibility in the collective bargaining process.

Morrissey presented entirely different facts. None of the procedures mandated in *Morrissey* was to occur until the parolee was actually arrested. 408 U.S. at 485. The "preliminary hearing" from which the parole officer was personally disqualified would not in the least be impaired or delayed by substituting another, easily available parole official.

Moreover, this Court in *Morrissey* specifically stated, "Obviously a parolee cannot relitigate issues determined against him in other forums," and further stated that if in fact the parolee had admitted violations which would warrant revocation under state standards, "that would end the matter." 408 U.S. at 490. In this case, the Hortonville teachers sought to justify their illegal strike by alleging bargaining improprieties before the wrong forum, they later admit-

[2]This Court itself stated in *Morrissey* that the danger was "personal friction." 408 U.S. at 486, n. 14.

ted in both the Wisconsin courts and this Court that they did strike, and the Wisconsin Supreme Court held (and respondents now admit) that dischcarge for striking is reasonable under state standards. See Resp. Br., p. 18. *Morrissey* requires no more.

Finally, in *Morrissey*, this Court stated there was no State interest in not affording the procedures mandated. As explained in petitioners' main Brief, the interests of the State and the general public here support the logical grouping of functions in an elected School Board and the retention of fair but efficient procedures whereby the Board can fulfill its primary obligation to operate the public schools.[3] In

[3]Other courts that have balanced the interests of striking employees in expanded procedures and the government's interest in resuming its functions have determined that the government's interests dominate. *E.g., Rockwell v. Board of Education*, 393 Mich. 616, 227 N.W.2d 736 (1975), *appeal docketed*, 44 U.S.L.W. 3207 (No. 75-466), where the court stated at 227 N.W.2d 744:

> "When public employees strike, the public employer must, like a private employer, be able to hire substitute employees so that the public business is not interrupted. In order to hire competent replacements, it may be necessary for the public employer to offer permanent employment and thus displace strikers. Where essential services have been suspended, the hiring of replacements often cannot await time consuming adjudicatory processes.
>
> "The prodominant interest secured by predisciplinary hearings, as advanced in *Arnett, supra*, is protection against removal of the wrong person and, assuming ultimate employee vindication, protection against interim financial deprivation.
>
> "The possibility of removal of a non-striker is minimized when, as here, the school board gives each striking teacher personal notice of the opportunity to return to the classroom before disciplinary action is taken. While on strike, a teacher receives no compensation; striking teachers do not suffer additional interim financial deprivation when disciplined."

See also the cases cited at pp. 17-18 of Pet. Brief and *Lake Michigan Community College Federation of Teachers v. Lake Michigan Community College*, 518 F.2d 1091, 1098-99 (6th Cir. 1975), *pet'n for cert. filed*, 44 U.S.L.W. 3351 (No. 75-698) (reversing a determination that the employer could not discharge illegal strikers because it was not a constitutionally impartial decisionmaker. The court said the college could correctly identify the strike participants, its decision was reviewable in the courts, and allegations of or defenses premised on employer misconduct were to be determined by the state labor agency). See also *Burnley v. Thompson*, — F.2d —, 91 LRRM 2033 (5th Cir. 1975).

concluding that the School Board was a constitutionally impermissible tribunal, the Wisconsin Supreme Court has failed to give these factors appropriate constitutional weight. It has applied the due process clause in a rigid and stultifying manner, forgetting that, "The incredible variety of administrative mechanisms in this country will not yield to any single organizing principle." *Withrow* v. *Larkin*, 421 U.S. at 55.

II.

RESPONDENTS' ASSERTION THAT THE DISCHARGES WERE A "PENALTY" IS AN ATTEMPT TO RECAST THE OPINION BELOW AND OUST THE BOARD FROM ITS ROLE AS EMPLOYER IN ORDER TO GAIN AN EFFECTIVE RIGHT TO STRIKE.

Neither Respondents nor their amicus argue that the Wisconsin court correctly construed the Due Process clause. Both attempt to recast the opinion and assert that the Wisconsin court was not concerned with the prohibited strike but only with the "penalty" to be imposed on the striking teachers. Respondents, of course, do not argue that they cannot be terminated for participating in the illegal strike since the court below expressly held that discharge and replacement was a lawful response to the strike under State law.

Respondents' penalty argument asserts that: (1) because State law did not require the Board to terminate and replace the teachers engaged in the prohibited strike, discharge is a "penalty"; (2) the teachers cannot be "penalized" unless their claimed "mitigating" facts (collective bargaining "misconduct") are considered; (3) only a different decisionmak-

er can impartially evaluate the claimed "mitigating" facts.

These assertions ignore the Wisconsin court's actual holding, and disguise Respondents' real goal in this case: to oust the elected Board from fulfilling its responsibility to reopen the schools.

A. Respondents Seek To Oust the Board of Its Policy-making Role.

Amicus NEA argues that a refusal to bargain by the Board, though not a justification for striking under State law, makes the discharge for striking unconstitutional, even though the refusal to bargain was not proved nor even pursued before WERC, the proper forum.

Using the label "penalty," NEA then asserts that when a claim of a refusal to bargain is made before the Board, the Board becomes incapable of taking action upon its policy to reopen the schools with replacements, because the discharge proceedings needed to implement the policy allegedly involve the union's accusation of misconduct by the Board. NEA protests (NEA Br., pp. 22, 31) that it does not in this case attack the Board's interest as an employer, nor its policy, but is concerned only about specific, case-by-case bias. However, NEA simultaneously attacks the Board's policy decision not to seek a discretionary injunction, and respondents attack (Resp. Br., p. 16) the Board's policy decision to abandon sporadic attempts to operate the schools with substitutes. (A. 192, 232)

This case does not hinge upon a particular, personal bias; the Wisconsin holding is not narrow. The Wisconsin court stated that a *de novo* hearing was necessary anytime the Board was in an "adversary position." (A. 257)

In this case, while the claim of unfair bargaining was

made before the Board by the teachers (and was labeled by the teachers, not the Board, as connected with striking), only a *policy* orientation, not bad faith bargaining, was alleged in the amended complaint herein. See the Amended Complaint, A. 132. While respondents' brief contains numerous assertions that the Board's bargaining conduct was improper or unlawful, none of these assertions is supported by a reference to any part of the record. These teachers have never sought review of the Board's bargaining conduct before the WERC, the specialized State agency expressly authorized to hear and remedy allegations of improper bargaining. Indeed, counsel for the teachers, when reminded at the pretermination hearing of the jurisdiction of the Wisconsin Employment Relations Commission, eschewed any interest in filing a prohibited practice complaint challenging the Board's bargaining conduct. (A. 97)

Respondents' actual complaint is that the Board did not accede to their bargaining demands: "The teachers submit that a job action was the only practical method to obtain intensive bargaining with this unresponsive, slow moving School Board." (Resp. Br., p. 17)

That clam has been and will always be the asserted justification for any public employee strike, particularly if making it will render the public employer powerless to replace striking employees.

B. Characterizing These Discharges As A "Penalty" Is Disingenuous and Cannot Change the Record or Wisconsin's Statutory Prohibition of All Public Employee Strikes.

This litigation began after the Board terminated the striking teachers upon their continuing refusal to return to

work. Instead of accepting the Board's offers of reemployment (A. 41), the teachers sought to enjoin the Board from hiring replacements on the theory that they had the right to strike if they struck in the belief that the Board had not bargained properly. (A. 6-37) The trial court disagreed:

> "The law in Wisconsin on this point is clear and succinct as set forth in Wisconsin Statute 111.70(4)(1) and I quote: 'Nothing contained in this subchapter shall constitute a grant of the right to strike by any county or municipal employee and such strikes are hereby expressly prohibited.'
>
> "That statute does not say nor has any Court in this state interpreted the statute to provide that strikes are expressly prohibited except when there is just cause. The legislative policy on this point is clear. Section 111.01(4) of the Wisconsin Statutes provides: 'It is the policy of this state in order to preserve and promote the interests of the public, the employe, and the employer, alike, to establish standards of fair conduct in employment relations and to provide a convenient, expeditious and impartial tribunal by which these interests may have their respective rights and obligations adjudicated.
>
> * * *
>
> "It is the further argument of the plaintiffs that the chain of cause and effect in this case is substantially as follows: That the defendants committed certain acts; those acts of defendants caused the strike; the strike caused the discharges and termination of employment notices to be sent on April 2nd, 1974. But, as I previously indicated, Wisconsin law does not give validity to the provocation—justified strike theory." (A. 124-125)

The Court repeated that conclusion in granting judgment for the School Board. (A. 195)

On appeal the Wisconsin Supreme Court did not upset these conclusions. The Court simply stated:

> "From the statutes, the cases cited, and the contract, we conclude the school board did have the power to discharge the teachers who engaged in the prohibited strike." (A. 239)

The teachers argue that since discharge for participating in the illegal strike is not automatic, discharge is a "penalty." It is true that state law did not *require* the Board to respond to the strike by terminating and replacing strikers. It is also true that a government has no interest in discharging striking employees unless it is going to replace them, since the government cannot operate without employees.

Characterizing discharge as a "penalty" has no analytical value. All discharges can be called a "penaty." Discharge is normally a response to past conduct such as insubordination, poor work or misconduct. The striking teachers here were not discharged for past conduct. Indeed, the reverse is true: the "mitigation" the teachers alleged was a *continuation* of their illegal strike as a response to alleged *past* conduct by the Board.

The respondents were simply advised that if they would not work the School Board would hire someone who would. The termination notices specifically stated that replacements were being sought and invited the teachers to contact the superintendent if they wish to continue their employment with the district. (A. 41)

Respondents also suggest that discharge is a "penalty" because another decisionmaker may have chosen a completely different course of action to cope with the prohibited strike. They quote from *Joint School District No. 1, City of*

Wis. Rapids v. *Wis. Rapids Educ. Assoc.*, 70 Wis. 2d 292, 234 N.W.2d 289 (1975), and suggest that the Board could have sought an injunction to open the schools. In *Wis. Rapids* an injunction was granted when the School Board showed that schools were closed and that there was "no assurance that the strike would come to an early end." 234 N.W.2d at 301. However, the Wisconsin Rapids teachers ignored the injunction and continued their illegal strike. *Id.* at 294.

Amicus NEA, implicitly conceding the tendency of public employees to ignore judicial return to work orders, confidently states: "Surely the state judiciary is not impotent to enforce its own decrees." (Br. of NEA, p. 2). However, in *In Re Webb*, — Cal. App. —, 91 LRRM 2018 (No. 1 Crim. 14518, Oct. 7, 1975), the Superior Court clerks struck, effectively halting the court's activities. The clerks disobeyed an injunction against the illegal strike and were jailed for contempt. On a writ of habeas corpus a divided appellate court reversed, holding that the clerks had a constitutional right not to work and thus the public employer's only recourse was to terminate and replace them because they had quit.

Whatever the merits of trying to reopen schools by jailing or fining illegally striking teachers, as opposed to hiring permanent replacements, the fact remains that the School Board here had legal "cause" to dismiss the teachers for participating in the prohibited strike. (A. 239) Respondents' argument that the Board could have sought an injunction only underscores that the Board had to decide which admittedly lawful response would fulfill its "duty to keep the schools open and to staff them with competent teachers." (A. 255)

III.

THE DECISION BELOW RESTS UPON A MISREADING OF *MORRISSEY* v. *BREWER* AND NOT UPON STATE LAW GROUNDS.

Had the court below not misread *Morrissey v. Brewer*, 408 U.S. 471 (1972), it would not have concluded that "the board was not an impartial decisionmaker in a constitutional sense," (A. 253) and it would not have sustained the teachers' contention that Wis. Stat. §118.22(2), "which gives the school the exclusive right to hire and fire, is unconstitutional in that it denies due process." (A. 256) Wisconsin law does not require a hearing prior to the dismissal of a teacher. See Wis. Stat. § 118.22(2). Any need for the hearing held by the School Board here, as well as its purpose, emanates from *Board of Regents v. Roth*, 408 U.S. 564 (1972), not Wisconsin law.

If allowing the School Board to choose among admittedly lawful responses to an illegal strike does not violate the Due Process cause, there would be no need for a *de novo* hearing to determine whether there was a "more reasonable" course of action. (A. 255) Absent such a hearing respondents would not be contending here that discharge must be reasonable under all the circumstances.

At pages 18-19 of their brief respondents state:

> "There is no dispute that discipline may be imposed upon striking municipal employees. There is also no dispute that discharge may be one of the penalties allowed. In the absence of judicial intervention, there is no automatic penalty for striking, and, in fact, any penalty imposed must be reasonable under all the circumstances. *Durkin v. Board of Police and Fire Comm.*, 48 Wis.2d 112, 180 N.W. 2d 1 (1970)."

At page 25 respondents assert that: "Section 62.13(5)(i) of the Wisconsin Statutes allows *de novo* judicial review of the reasonableness of disciplinary proceedings against police and fire employees, including *de novo* review of the reasonableness of any penalties imposed." Again, *Durkin* is cited.

Respondents seriously misread *Durkin*. After an illegal strike by firemen had ended, one of the 270 strikers was suspended. He sought review and the court in *Durkin* found a denial of due process in the failure to notify the fireman that the hearing would consider whether he violated department rules. The court then stated:

> "No court of review has the means of determining whether the Board would have imposed the same penalty had it found the respondent in violation of only two of the violations charged in the complaint." 48 Wis. 2d at 213, 180 N.W.2d at 6.

The matter was remanded to the Police and Fire Board for further proceedings, if any. The court suggested that the Board consider: (1) a strike amnesty agreement; (2) that the Board itself decided not to proceed against any of the striking firemen; and (3) that the elector's complaint which initiated the proceeding was filed against only one fireman.

Not only does *Durkin* have nothing whatsoever to do with teachers, it reminds that in a common law certiorari proceeding an arbitrary or unreasonable result will not be affirmed. There is no dispute that teachers here could have sought review in such a proceeding.

If, as respondents assert, the lawfulness of the Board's prior bargaining conduct was relevant to the discharge proceeding, then the Board's refusal to admit the evidence proffered by the teachers' counsel at the hearing would have

been an error correctible by the courts in a common law certiorari proceeding, which under Wisconsin law could determine:

> ". . . (1) Whether the board kept within its jurisdiction; (2) whether it proceeded on correct theory of law; (3) whether its action was arbitrary, oppressive, or unreasonable and reresented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question." *State ex rel. Ball v. McPhee* (1959), 6 Wis. 2d 190, 199, 94 N.W.2d 711. *See also State v. Goulette* (1974), 65 Wis. 2d 207, 222 N.W.2d 622. (A. 255)

In this case, the Wisconsin Supreme Court approvingly cited *Millar* v. *Joint School District*, 2 Wis. 2d 303, 86 N.W. 2d 455 (1957), in stating that the petitioners could dismiss the teachers for participating in the strike. *Millar* reviewed prior Wisconsin cases and confirmed that a School Board could dismiss a teacher for failing to perform his duties. Also cited with approval was *Richards* v. *Board of Education*, 58 Wis. 2d 444, 206 N.W.2d 597 (1972), where the court said that a government employer's plenary power to terminate a public employee is limited only as provided by statute or a valid contract. *Id.* at 451-52. None of these cases suggests that Wisconsin law provides that an illegally striking teacher can be terminated and replaced only if a court ultimately agrees with the employer's choice of "penalty" in a *de novo* proceeding.

The Wisconsin court here did not decide that existing review procedures were inadequate because respondents were entitled to more expansive procedures under State law. Certiorari review and review by the Wisconsin Employment

Relations Commission, neither of which respondents sought, were declared inadequate under the Due Process clause of the Federal Constitution as interpreted by the Wisconsin Supreme Court.

CONCLUSION

The Wisconsin Supreme Court decided that the petitioners, acting as dedicated public servants, lawfully responded to a prohibited strike that demanded immediate attention. However, the Wisconsin court held that the "process due" respondents under this Court's prior decisions included a decisionmaker that did not have a collective bargaining responsibility.

Before this Court, neither respondents nor NEA argues that the Wisconsin Supreme Court's decision is correct. Rather, they agree with petitioners that this Court's prior Due Process decisions have carefully avoided limiting the exercise of lawful discretion by government officials and have focused on the adequacy of fact-finding procedures. Thus, they ignore the Wisconsin court's opinion and make the strained "penalty" argument in an attempt to show that the petitioners could not impartially determine certain claimed "mitigating facts."

Respondents concede that their conduct, regardless of their intent, constituted legal "cause" for discharge under State law. Respondents do not deny that they were accorded a record hearing at which the petitioners could impartially determine whether respondents had engaged (and were continuing to engage) in that conduct. At that point the Due Process clause was satisfied. There was no risk that the teachers would be deprived of their employment by mistake

or in violation of their legal rights. The teachers may have hoped that the Board would not discharge them for striking. They may even have unilaterally expected that the Board would not seek to reopen the schools with replacements. However, those expectations are not "property" interests protected by the Due Process clause:

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it." *Board of Regents v. Roth,* 408 U.S. at 577.

For the foregoing reasons the judgment of the Wisconsin Supreme Court should be reversed.

Respectfully submitted,

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